83-1166

Office - Supreme Court, U.S.
FILED
JAN 16 1984
ALEXANDER L. STEVAS
CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

PAUL SILVER
AND
DONALD W. PARKER,
Petitioners

v.

JOHN C. BENSON JR., et al.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA AND APPENDIX

Peter Hearn
Sally Akan
Lynne Delanty Spencer
Joan A. Yue
PEPPER, HAMILTON & SCHEETZ
2001 The Fidelity Building
123 South Broad Street
Philadelphia, PA 19109
(215) 893-3000
Attorneys for Petitioners

Of Counsel:
Paul Bender
3400 Chestnut Street
Philadelphia, PA 19104

THE LEGAL INTELLIGENCER, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

QUESTION PRESENTED

Petitioners, former township supervisors in rural Pennsylvania whose sole compensation was $25 a meeting, were surcharged $35,743.23 because they expended that amount of township funds to support and lobby for the passage of state legislation affecting the township's zoning procedures.[1] This occurred despite a subsequent finding by the trial court that they relied upon the opinion of counsel that the expenditures were lawful, and that petitioners acted "in good faith and without fraud . . . for what they thought was a proper township purpose." (A13) Therefore, the question presented here is:

Are municipal corporations, when speaking on matters concerning their governmental responsibilities, themselves endowed with First Amendment rights comparable to those possessed by private corporations under this Court's decision in *First National Bank of Boston v. Bellotti*?

---

1. The names of the respondents are as follows:

John C. Benson, Jr., Norma Benson, George Collie, David A. Downs, Myron Fetch, Charles Frederick, Wilmer Frederick, J. Richard Huber, William G. Kane, John R. Morris, Elaine Morris, Alfred M. Simons, Anna C. Simons, William J. Warren, George E. Wiggins, John Yerkes and William H. Yerkes, III.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	7
I. This Case Should Be Reviewed Because It Presents The Question Whether The First Amendment Rights Conferred On Private Corporations In *First National Bank Of Boston v. Bellotti* Apply To Municipal Corporations Whose Elected Officials Lobby On State Legislation Concerning Their Governmental Responsibilities	7
II. The Court Should Review This Case To Elucidate The Principles Governing The Interplay Between First Amendment Rights And State Law Governing The Conduct Of Municipal Corporations	12
A. Because This Court Has Never Squarely Held That Municipal Corporations Have A First Amendment Right To Speak, The Statement By Three Justices Of This Court In *City Of Boston v. Anderson* Creates Doubt As To Whether And To What Extent The First Amendment Extends To Speech By Municipal Corporations	12

TABLE OF CONTENTS—(*Continued*)

Page

B. Lacking Articulated Principles, The Commonwealth Court Applied An Unduly Restrictive Construction Of State Law In Conflict With The First Amendment 13

CONCLUSION 16

APPENDIX:

Opinion and Order of the Commonwealth Court of Pennsylvania, Dated June 6, 1983 ..... A1

Opinion and Order of the Court of Common Pleas of Bucks County, Dated April 19, 1982 ..... A7

Additional Opinion of The Honorable Edward G. Biester, Jr., of the Court of Common Pleas of Bucks County, Dated April 19, 1982 ..... A15

Commonwealth of Pennsylvania Lobbying Registration Act, 46 Pa. Stat. Ann. §148.2 (Supp. 1983-1984) A17

Commonwealth of Pennsylvania Municipalities Planning Code, 53 Pa. Stat. Ann. §§10201, 10202, 10209.1 (1972 & Supp. 1983-1984) .. A17

Commonwealth of Pennsylvania Second Class Township Code, Article IX, 53 Pa. Stat. Ann. §§65902, 65902.2 (1957 & Supp. 1983-1984). A19

TABLE OF AUTHORITIES

Cases	Page
Anderson v. City of Boston, 376 Mass. 178, 380 N.E.2d 628 (1978), *appeal dismissed*, 439 U.S. 1060 (1979)	12, 15-16
Board of Supervisors of Buckingham Township v. Barness, 33 Pa. Commw. 364, 382 A.2d 140 (1978), *cert. denied*, 439 U.S. 1116 (1979)	3, 15
Buckley v. Valeo, 424 U.S. 1 (1976)	9
City of Boston v. Anderson, 439 U.S. 951 (1978)	12
City of Boston v. Anderson, 439 U.S. 1389 (1978)	12
Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530 (1980)	13
Enterprise Irrigation District v. Farmers Mutual Canal Co., 243 U.S. 157 (1917)	14
First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978)	7-13
Liberty Lobby, Inc. v. Pearson, 390 F.2d 489 (D.C. Cir. 1967)	8
Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977)	10
Michigan v. Long, 103 S. Ct. 3469 (1983)	14
Perry Education Ass'n v. Perry Local Educator's Ass'n, 103 S. Ct. 948 (1983)	15
Thomas v. Collins, 323 U.S. 516 (1944)	8
Thornhill v. Alabama, 310 U.S. 88 (1940)	8
United States v. Grace, 103 S. Ct. 1702 (1983)	15
Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976)	9

TABLE OF AUTHORITIES—*(Continued)*

Constitutional Provisions and Statutes	*Page*
U. S. Cons. Amend. I	2
U. S. Cons. Amend. XIV	2
28 U.S.C §1257(3)	2
46 Pa. Stat. Ann. §148.2(ii)(c)	5
53 Pa. Stat. Ann. §10609.2	15
53 Pa. Stat. Ann. §65515	4
53 Pa. Stat. Ann. §65545	2
53 Pa. Stat. Ann. §65725	8
53 Pa. Stat. Ann. §65902A(1)-(2)	14
53 Pa. Stat. Ann. §65902A(4)	15
53 Pa. Stat. Ann. §65902.2	14

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

PAUL SILVER
AND
DONALD W. PARKER,
Petitioners

v.

JOHN C. BENSON JR., et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

Petitioners, Paul Silver and Donald W. Parker, respectfully pray that a writ of certiorari issue to review the judgment of the Commonwealth Court of Pennsylvania entered in the above matter.

OPINIONS BELOW

The Opinion and Order of the Commonwealth Court of Pennsylvania have been reported at 460 A.2d 904 (1983). For the Court's convenience, they are reprinted in the Appendix hereto at A1.

The Opinion and Order of the Court of Common Pleas of Bucks County, Pennsylvania, per the Honorable William Hart Rufe, III, have been reported at 39 Bucks Co. L.R. 146 (1982). They are also reprinted in the Appendix at A7. The "Additional Opinion" filed by the Honorable Edward G. Biester, Jr., of the Court of Common

Pleas of Bucks County was not made a part of the official report of this case. In order to present this Court with a complete record, it too has been reprinted in the Appendix at A15.

JURISDICTION

The Commonwealth Court of Pennsylvania affirmed the judgment of the trial court on June 6, 1983, and the Supreme Court of Pennsylvania denied a petition for allowance of appeal on October 17, 1983. This Court has jurisdiction under 28 U.S.C. §1257(3) to review the final judgment of the highest court of a state in which a decision could be had, which judgment results in the denial of a right protected by the First Amendment to the Constitution of the United States.

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutory provision involved is Section 545 of the Second Class Township Code of the Commonwealth of Pennsylvania, 53 Pa. Stat. Ann. §65545 (Supp. 1983-1984), which provides in pertinent part:

> Any elected or appointed officer, whose act, error or omission has contributed to the financial loss of any township, shall be surcharged by the auditors with the amount of such loss, and the surcharge of any such officer shall take into consideration as its basis, the results of such act, error or omission and the results had the procedure been strictly according to law.

This case also involves the First Amendment to the Constitution of the United States, as applied to acts of the states by the Fourteenth Amendment.

STATEMENT OF THE CASE

This case arose when nineteen taxpayers of Buckingham Township, Pennsylvania, sought to personally surcharge two of three former elected supervisors because they approved the expenditure of township funds to support lobbying efforts for the passage of a state law directly affecting the township's zoning powers and procedures. The funds were spent for paper and postage, mileage reimbursement to testify at the state capitol, telephone calls, office equipment, secretarial services, a lobbying consultant, and an opinion letter from outside counsel about aspects of the proposed legislation. (R. 67a-68a at ¶1)[2]

That legislation had been introduced during a public controversy over the procedure for approving real estate development plans under current zoning laws. The issue had been litigated in the case of *Board of Supervisors of Buckingham Township v. Barness*, 33 Pa. Commw. 364, 382 A.2d 140 (1978), *cert. denied*, 439 U.S. 1116.[3] In response to the *Barness* decision and to place limits on the ability of private individuals to use the so-called curative amendment procedure to override local zoning and land use requirements, petitioners led an

---

2. References designated "R. __" are to pages of the Reproduced Record in the Commonwealth Court. References designated "A__" are to pages of the Appendix hereto.

3. The controversy arose when Buckingham rejected private proposals, known as curative amendments, to develop land in a manner inconsistent with the township's 1951 zoning ordinance, defective as a result of a 1970 judicial decision. The township had already prepared and was holding hearings on a new comprehensive plan and zoning ordinance which would have cured those defects. Buckingham's position was that a township should have reasonable time within which to revise land use ordinances rendered defective by judicial action before having to implement the curative amendments of private parties seeking development inconsistent with the revised ordinance proposed by the township. This position was rejected in *Barness*, but was later adopted by the legislature in part as a result of the lobbying efforts at issue in this case. (A7-A8)

effort to secure passage of state legislation amending the curative amendment statute. (A7-A8) Many other municipalities as well as a statewide organization of township supervisors also supported this legislation. (R. 60a at ¶¶10, 12; 65a-66a at ¶¶6-8) Petitioners themselves kept their constituents informed of their efforts through periodic mass mailings and through a publicly advertised meeting attended by approximately 450 township residents held at the outset of the lobbying campaign. (R. 64a-65a at ¶5)

All of petitioners' acts in support of this lobbying campaign were done in their official capacities as elected supervisors who spoke and acted on behalf of the township. Township supervisors are only nominally compensated for their services, receiving $25 for each meeting of the Board of Supervisors which they attend. 53 Pa. Stat. Ann. §65515 (Supp. 1983-1984)

When the Buckingham Township Board of Auditors issued their annual report for 1978, they raised a question about the legal basis for the lobbying expenditures, but they voted unanimously not to surcharge the supervisors. (R. 67a at ¶10) The taxpayers then appealed the audit report by petition to the Court of Common Pleas of Bucks County. Petitioners raised the First Amendment issues asserted herein by way of affirmative defense in their answer to the taxpayers' petition, and they continued to press the constitutionally protected nature of Buckingham's lobbying activity at every level of the state court proceedings. (R. 15a at ¶25)

Following disposition of preliminary motions and rulings on the relevance of the parties' proposed factual stipulations, the trial court ordered surcharge of Silver and Parker jointly and severally in the amount of $35,743.23.[4] At the time it did this, the trial court ex-

4. Mr. Parker has filed for personal bankruptcy in the United States District Court for the Eastern District of Pennsylvania (Bankruptcy No. 81-04960-Chapter 7).

pressly found that petitioners did not profit financially from these expenditures and that they "acted in good faith and without fraud in spending township funds for what they thought was a proper township purpose." (A13) However, the trial court held that a municipal corporation had no grant of authority, express or implied, under any state law to expend public funds in support of the municipality's views on legislative issues and did not discuss the constitutional issue.

On appeal, the Commonwealth Court of Pennsylvania affirmed the court below. In doing so, it observed that under Section 148.2(ii) of the Lobbying Registration Act, which excepts employees of political subdivisions of the state from the registration requirements for lobbyists, 46 Pa. Stat. Ann. §148.2(ii)(c) (Supp. 1983-1984) [A17], not only do local government officials visit the state capitol to present the views of their communities, but that "this type of activity is in no sense evil or pernicious; in most cases, it is probably laudable." (A4) However, the court upheld the surcharge because it believed the expenditures were not properly budgeted.[5] In so ruling, the court took no account of the fact that the period within which state law permits amendments to a township's budget to be made had expired before the lobbying expenditures in question had been contemplated. Accordingly, it would have been impossible for petitioners to follow the procedure required by the Commonwealth Court.

With respect to the First Amendment claim, the Commonwealth Court stated:

---

5. Contrary to the implication of the decision below, the funds spent for lobbying were not in excess of the amount the township expected to spend for the entire governmental function that year. Neither the township auditors nor the trial court found that total expenditures for fiscal year 1978 exceeded the amount properly budgeted for that year. No new taxes were necessary and no deficit was incurred. The funds were "unbudgeted" only in the sense that there was no line item allocated for lobbying.

> The taxpayers' action here, however, does not abridge the rights of the supervisors to speak their views on legislation or to seek redress of grievances; it is concerned instead with the unfettered expenditure by public officials who did not have any express or implied authorization for such expenditure. No one seeks to deny the supervisors their right to free speech; rather, it is merely argued that, if the supervisors wished to lobby in Harrisburg, they could have proposed such activity at a Township meeting, given the taxpayers of the Township notice of their plans, and sought a reasonable amount of funds for this purpose in the normal course of procedure.

(A5)

A petition for allowance of appeal seeking review by the Supreme Court of Pennsylvania was filed on July 6, 1983. The First Amendment claim raised here was raised in that petition. The petition was denied on October 17, 1983.

The effect of these state court rulings has been to restrict unconstitutionally the rights of municipalities, through their elected officials, to express their views and to expend municipal funds to do so. This has been accomplished by imposing the financial penalty of surcharge against the officials through whom a municipality must act.

REASONS FOR GRANTING THE WRIT

I. This Case Should Be Reviewed Because It Presents The Question Whether The First Amendment Rights Conferred On Private Corporations In *First National Bank Of Boston v. Bellotti* Apply To Municipal Corporations Whose Elected Officials Lobby On State Legislation Concerning Their Governmental Responsibilities.

This case, like *First National Bank of Boston v. Bellotti*, 435 U.S. 765, raises the important question whether speech protected by the First Amendment may be abridged because of the identity of the speaker. In holding that a statutory ban on certain political activity by business corporations was inimical to the First Amendment, this Court in *Bellotti* confirmed that if the speech is protected, the First Amendment protects both the right of the speaker to speak and the right of the public to hear. Mr. Justice Powell, writing for the majority, said:

> If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decision making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. *The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.*
>
> * * *
>
> [T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.

Id. at 777, 783 (emphasis added) (footnotes and citations omitted).

If the petitioners here were not speaking on behalf of municipal corporations, no one would suggest that the state could punish their speech. As the Chief Justice concluded in his concurring opinion in *Bellotti*:

> [T]he First Amendment does not "belong" to any definable category of persons or entities: It belongs to *all those* who exercise its freedom.

Id. at 802 (emphasis added).[6]

There can be little doubt that the lobbying efforts for which petitioners were penalized (which included communications with the citizens of the township, with other similarly situated townships, and with the state legislature) constitute speech that is specifically protected by the First Amendment. *See, e.g., Liberty Lobby, Inc. v. Pearson*, 390 F.2d 489, 491 (D.C. Cir. 1967) ("every person or group engaged . . . in trying to persuade [legislative] action is exercising the First Amendment right of petition") (Burger, J.); *cf. Thomas v. Collins*, 323 U.S. 516, 537 ("First Amendment is a charter for government. 'Free trade in ideas' means free trade in the opportunity to persuade to action"). Like the referendum question in *Bellotti*, the legislation here was a "matter of public concern . . . about which information [was] needed [and] appropriate." *See* 435 U.S. at 776 (quoting *Thornhill v. Alabama*, 310 U.S. 88, 101-02).[7]

---

6. The concern expressed by three of the dissenting Justices in *Bellotti* is not implicated here. Unlike the referendum in *Bellotti*, which went beyond the business purpose of the private corporation, the penalized speech here was addressed to legislation relating to zoning, a statutorily defined responsibility of the township. 53 Pa. Stat. Ann. §65725.

7. The fact that money is spent to disseminate speech does not take the communication outside the realm of protected activity. "It is too late to suggest 'that the dependence of a communication on the expenditure of money itself operates to introduce a nonspeech element or to reduce the exacting scrutiny required by the First

Ironically, in according the protection of the First Amendment to petitioners' individual expression, the Commonwealth Court implicitly acknowledged that the communications constituted protected speech. (A5) Compounding the irony, the Commonwealth Court also recognized that local government officials do lobby the legislature on behalf of their local governments and observed that "this type of activity is in no sense evil or pernicious; in most cases, it is probably laudable." (A4) Yet, despite this apparent recognition that the speech is protected, the court affirmed the imposition of a personal monetary sanction against petitioners. In so doing, the Commonwealth Court effectively denied the protection of the First Amendment to the entity most directly interested and most able to speak — the township itself.

The result reached by the Commonwealth Court is further offensive to constitutional principle because the discrimination against municipal corporate speech, effected by the personal surcharge against municipal officials, has the concomitant effect of restricting the fund of information available to the public and, thereby, impermissibly burdens the public's right to know and to act upon that knowledge. *See, e.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756. Denying municipal officials the protection of the First Amendment when speaking on behalf of the municipality to its citizens and to the state legislature on proposed legislative action that directly affects the municipality's statutorily mandated responsibilities prevents a unique point of view from informing public discussion, debate, and decision-making on an important public issue. This serves only to limit the market of ideas and enhance the speech of opposing interests. *See First National Bank v. Bellotti, supra*, 435 U.S. at 777 n.12 (" 'speech concerning public affairs is more

---

Amendment.' " *First National Bank v. Bellotti, supra*, 435 U.S. at 786 n.23 (quoting *Buckley v. Valeo*, 424 U.S. 1, 16).

than self-expression; it is the essence of self-government,' " which suffers when "competing views on public issues from 'diverse and antagonistic sources' " are suppressed).

In all probability, if the township is not permitted to speak in its own interest and that of its constituency through its duly elected officers, its point of view will not be heard. As a practical matter, it is unlikely that local officials who perform many hours of work on behalf of their townships for a nominal sum would be willing to finance personally an effective lobbying effort. Nor is it practical to assume that individual citizens will organize and speak out on issues affecting their collective interests as citizens of the municipality.[8] Furthermore, given the comparatively extensive resources of organized special interests, it seems clear that the voices of individual proponents of the township's interests would have difficulty gaining access to a market of ideas monopolized by an organized opposition. *See, e.g., Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 93 (serious question existed whether challenged ordinance left open " 'ample alternative channel of communication' ").

Denying municipal corporations a First Amendment right to speak through their officials unduly burdens the right of township citizens to hear how the business of the municipality is affected by judicial and legislative developments. The sweeping ruling by the Commonwealth Court penalized all of petitioners' lobbying activities without regard to the particular nature of the various communications. The state court's decision

---

8. The seat of government, where so many decisions are made, is too remote to expect many citizens to travel there to present grievances to their government in person. Apart from such practical limits, many citizens rightfully believe that one of the functions of representative democracy is to select leaders who then speak for the interests of the community for a fixed time. Because citizens rely on public officials to fulfill this role, prohibiting lobbying by municipalities through those officials will greatly reduce the quantum of speech on important public issues.

would require the supervisors to reimburse the municipality for postage and telephone expenses arising from efforts to keep both the local citizenry and their statewide representatives informed about the impact upon the community of particular legislative programs and proposals. Local officials cannot respond, with any assurance of impunity, to direct inquiries from constituents or from state legislators with respect to the municipality's policy on a particular matter.

Finally, the substantial personal monetary penalty imposed upon petitioners will greatly impair future discussion and debate by municipal officials.[9] If this Court declines review, the judgment of the state court will stand as a significant inhibition upon both the number of speakers and the absolute quantum of speech addressing important questions concerning the powers and responsibilities of local government in Pennsylvania, and potentially across the country. Even if they act in good faith and with the advice of counsel as to the legality of their conduct, other municipal officials will think that they cannot undertake to communicate with their state legislature, other similarly situated municipalities, or even their own citizens regarding pending legislation without running some risk of personal financial responsibility. Under these circumstances, few if any local officials will risk speaking for the municipality.

Thus, the need for review of the federal constitutional question presented by this case is compelling and the time is ripe for this Court to apply the principles articulated in *Bellotti* to municipal corporations.

---

9. Respondents have previously sought to minimize the impact of the penalty by referring *de hors* the record to insurance coverage. This does not dispose of the issues raised. First, the existence of insurance is irrelevant to analysis of the First Amendment. Second, the policy in question has a deductible provision which leaves a significant personal liability. Third, insurance companies may disclaim liability in some cases. Finally, the state court's ruling will apply to all municipalities, many of which may not maintain insurance covering these losses.

II. The Court Should Review This Case To Elucidate The Principles Governing The Interplay Between First Amendment Rights And State Law Governing The Conduct Of Municipal Corporations.

A. Because This Court Has Never Squarely Held That Municipal Corporations Have A First Amendment Right To Speak, The Statement By Three Justices Of This Court In City Of Boston v. Anderson Creates Doubt As To Whether And To What Extent The First Amendment Extends To Speech By Municipal Corporations.

City of Boston v. Anderson involved the same state referendum that was involved in *Bellotti*. The issue was whether the City of Boston should be enjoined from expending city funds to affect the outcome of the referendum. The Supreme Judicial Court of Massachusetts affirmed entry of the injunction. *Anderson v. City of Boston*, 376 Mass. 178, 380 N.E. 2d 628 (1978). On application to this Court for a stay of the state court judgment, Mr. Justice Brennan granted the application and entered the stay pending further action. *City of Boston v. Anderson*, 439 U.S. 951. A motion to vacate the stay order was denied with Justices Stevens, Stewart and Rehnquist dissenting. 439 U.S. 1389. The appeal was later dismissed for want of a substantial federal question. 439 U.S. 1060. Justices Brennan, Blackmun and Powell stated that they would note probable jurisdiction and set the case for oral argument.

The dismissal of the appeal in *Anderson* leaves unresolved the question of the First Amendment's application to municipal corporations. The remarks in the dissent from denial of the motion to vacate the stay can be read as leaving states free to impose any constraints on municipal corporations without regard to constitutional considerations.[10] Given the special place of the First

10. Mere status as a creature of the state or a regulated enterprise has not previously been thought to require such a result. *See*,

Amendment in our hierarchy of values, such a notion should not go unexamined.

B. Lacking Articulated Principles, The Commonwealth Court Applied An Unduly Restrictive Construction Of State Law In Conflict With The First Amendment.

The Commonwealth Court's attempt to recast the question before it as a simple matter of state budgeting law which does not implicate the First Amendment ignores the constitutional principles discussed above. Even if that opinion can be read as acknowledging the constitutional right of municipal officials to engage in such speech on behalf of the municipal corporation, the holding below still offends the First Amendment by unreasonably restricting the circumstances under which the municipality may speak.[11] Furthermore, because the right of a state to impose constraints of the type approved by the Commonwealth Court upon the exercise of a municipality's right to communicate with the state legislature itself implicates First Amendment questions, petitioners' failure to make specific provision in

---

e.g., First National Bank v. Bellotti, supra, 435 U.S. at 778-79 n.14; *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 534 n.1.

11. At issue in this case is the First Amendment right of the municipal corporation, not of the supervisors personally. The freedom of township officials to speak their own views has no bearing on the unconstitutional burden imposed on the municipality's ability to communicate its unique views to the legislature or the public's right to hear those views. To the extent the township may speak but not spend money to make that speech heard, the opinion rests on an incorrect assumption about the nature of First Amendment rights. *See* note 7 *supra*. On the other hand, to the extent the decision concedes only the free speech rights of township officials personally, it implicitly rejects the central premise of petitioners' argument — that municipal corporations, once created by the state, are themselves endowed with First Amendment rights comparable to those possessed by private corporations under this Court's decision in *Bellotti*.

Buckingham's 1978 budget for the township's lobbying effort cannot constitute adequate non-federal grounds for personally surcharging the supervisors.[12] Given the severe constraints imposed upon the budgeting process by applicable state law, requiring all lobbying to be anticipated and separately provided for in the township's annual budget constitutes an unconstitutional burden upon the exercise of municipal speech.

Under Section 902A of the Second Class Township Code, the proposed annual budget must be prepared, publicly advertised, made available for inspection for at least twenty days, amended if necessary and formally adopted no later than December 31st of the year preceding the budget year. 53 Pa. Stat. Ann. §65902A(1)-(2) (Supp. 1983-1984). (A19) Although Section 902.2 of the Code permits amendment of the budget "during the month of January," any amended budget "must" be publicly advertised, made available for inspection for a period of at least ten days, and adopted on or before February 15. 53 Pa. Stat. Ann. §65902.2 (Supp. 1983-1984). (A20) Therefore, unless an issue is foreseen before the end of January of the budget year, the budget cannot be amended and the township cannot communicate with the legislature on that issue during the balance of that year.[13] Where, as a practical matter, the issue is resolved before a new annual budget takes effect, the township

12. As this Court recently said in *Michigan v. Long*:

"where the non-federal ground is so interwoven with the [federal ground] as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain." *Enterprise Irrigation District v. Farmers Mutual Canal Company*, 243 U.S. 157, 164, 37 S. Ct. 318, 321, 61 L. Ed. 644 (1917).

103 S. Ct. 3469, 3474 n.4. The decision below does not contain the "plain statement" required by *Long* making clear that the state law grounds for decision are truly independent and not interwoven with federal law.

13. The unreasonableness of the restriction imposed by the decision below is dramatically illustrated by the facts of this case. *Barness* was decided on January 25, 1978. The public meeting to

will have been silenced, regardless of the importance of the issue to the community.[14]

This temporal restraint on communicative activity must be judged in light of the well settled principle that the scope within which states may restrict freedom of expression is extremely narrow.

> The government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place, and manner regulations as long as the restrictions "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."

United States v. Grace, 103 S. Ct. 1702, 1707 (quoting *Perry Education Ass'n v. Perry Local Educator's Ass'n*, 103 S. Ct. 948, 955). Measured by this standard, the conditions placed by Pennsylvania upon expressive conduct by municipal corporations do not pass constitutional muster, for those restrictions neither serve a compelling state interest nor leave open adequate alternative channels of communication.[15]

---

discuss lobbying in support of the legislative response to that decision was not organized until March 21, 1978. (R. 64a-65a at ¶5) By that time, petitioners had no legal power to amend the 1978 budget to include lobbying expenses. The bill in question was enacted and signed into law by October 5, 1978, before the start of a new budget year. *See* 53 Pa. Stat. Ann. §10609.2. Hence, under the Commonwealth Court's decision, Buckingham would have been denied the right to speak on that issue.

14. Although neither the Commonwealth Court nor respondents referred to it, §902A(4) of the Second Class Township Code which permits "supplemental appropriations for any lawful purpose," 53 Pa. Stat. Ann. §65902A(4) [A19-A20], does not provide a means for petitioners to have avoided the strictures of the Code sections on budgeting. The thrust of the Commonwealth Court's opinion is that the township (as distinguished from the supervisors individually) did not have "express or implied authorization" under state law to lobby. (A5) Thus, any supplemental appropriation by the township would not have been for a "lawful purpose."

15. The state interests which concerned the Supreme Judicial Court in *Anderson v. Boston*, *supra* — the possible contamination of

CONCLUSION

The Commonwealth Court's holding in this case, if not reviewed and reversed by this Court, will chill the exercise of free speech on behalf of muncipalities. Municipal officials will be reluctant to speak knowing that petitioners were surcharged more than $35,000 for lobbying, that the lobbying related directly to the township's zoning concerns, and that the surcharge occurred even though the township solicitor endorsed the expenditure and the supervisors thought they were carrying out a proper township purpose. The public's right to know will also suffer with these constraints on fully informed debate. Such a result surely warrants review by this Court.

Respectfully submitted,

PETER HEARN
SALLY AKAN
LYNNE DELANTY SPENCER
JOAN A. YUE
Pepper, Hamilton & Scheetz
2001 The Fidelity Building
123 South Broad Street
Philadelphia, PA 19109
(215) 893-3000
Attorneys for Petitioners

Of Counsel:
PAUL BENDER
3400 Chestnut Street
Philadelphia, PA 19104

January 16, 1984

NOTE — *(Continued)*
the electoral process by government efforts to influence a choice expressly reserved to the electorate — is not involved here. Legislative lobbying by municipal officials on behalf of the municipality differs, because it involves speech on behalf of the collective interest by already duly elected representatives, who may be removed at the next election should they cease to speak for the majority. Moreover, such speech is not directed to the electorate, but rather to the legislature, and concerns issues bearing on their duties as representatives.

APPENDIX

IN RE APPEAL FROM THE SETTLEMENT AND AUDIT OF THE AUDITORS OF BUCKINGHAM TOWNSHIP, BUCKS COUNTY ETC.

Appeal of Paul Silver and Donald W. Parker.

Commonwealth Court of Pennsylvania.

Argued April 5, 1983

Decided June 6, 1983

Before CRUMLISH, *President Judge*, and ROGERS, BLATT, CRAIG and MACPHAIL, *JJ*.

OPINION

BLATT, *Judge*.

The Buckingham Township Supervisors (supervisors) appeal here an order of the Court of Common Pleas of Bucks County which subjected them to a surcharge in the amount of $35,743.23[1] for monies unlawfully paid from Township funds. Section 545 of the Second Class Township Code (Township Code), Act of May 1, 1983, P.L. 103, *as amended*, 53 P.S. §65545.

It was stipulated that the supervisors, in their official capacities, approved[2] the expenditures here in question and that these expenditures were made in a successful effort to lobby before the state legislature for the passage of laws to amend various provisions of the Penn-

1. The monies were spent for legal fees, the services of a public relations firm, a registered lobbyist, a fund raiser, as well as expenditures to cover business machine rental fees, secretarial expenses, copying costs, postage, and telephone expenses. In addition to the hiring of the outside consultants, the record also indicates direct lobbying activities on the part of the supervisors.

2. Supervisor Julian Perry voted against these expenditures, and is therefore not subject to the surcharge here.

sylvania Municipalities Planning Code. Following the annual audit during which these expenditures came to light, several Township citizens (taxpayers) filed a surcharge petition in the common pleas court. That petition was successful and the supervisors now seek review here.

The supervisors argue first that the trial court erred in not quashing the taxpayers' appeal from the auditor's report because only one of the taxpayers had signed the recognizance. They note that Section 554 of the Township Code, 53 P.S. §65554, provides in pertinent part:

> No appeal by a registered elector or taxpayer or officer shall be allowed unless the *appellant* shall enter into recognizance to prosecute the same with effect, and to pay all costs accruing thereon, ... (Emphasis added.)

The supervisors, however, cite *Mayo's Appeal*, 315 Pa. 269, 172 A. 848 (1934) and *Monroe County Auditors' Report*, 319 Pa. 63, 179 A. 752 (1935), and contend that the recognizance is fatally defective and therefore, that the trial court was without jurisdiction to hear the matter. These cases cited, however, were decided under an older version of the statute, since repealed, which provided in pertinent part:

> *Any ten or more taxpayers of the county may*, in behalf of such county, appeal from the report of its county auditors or controller to the court of common pleas, or prosecute any suit or action in behalf of said county, or defend such county in any suit, process or action now pending, or that may be brought against such county, by appeals from county auditors' or controllers' reports or otherwise. If no appeal is entered by county officials, the appeal by such taxpayers shall be entered within ninety days after the filing of such report in the court of common pleas. The *appellants* shall enter into recognizance,

> with two sufficient sureties, conditioned that the appellate shall prosecute said appeal with effect, and pay all costs that may accrue thereon. . . .

Section 1035 of the General County Law, Act of May 2, 1929, P.L. 1278, *formerly* 16 P.S. §1035 (emphasis added). This former statute required 10 or more taxpayers to bring the appeal and it refers to "appellants"[3] in the plural. Section 554 of the Township Code, on the other hand, does not require any special number of taxpayers and employs the word "appellant" in the singular. We believe, therefore, that the recognizance here concerned complies with the Township Code and that the trial judge was correct, therefore, in not granting the supervisors' motion to quash.

The supervisors then argue that, inasmuch as Section 702 of the Township Code, 53 P.S. §65725 gives the Township the power to adopt and enforce zoning ordinances, their lobbying expenditures to promote zoning legislation in the General Assembly is a power that is necessarily implied from the express grant of the zoning power. *See Borough of Scottdale v. National Cable Television Corp.*, 476 Pa. 47, 381 A.2d 859 (1977). They do not cite to any Pennsylvania authority for this proposition, however, and we must agree with the trial judge, that, although the activities here concerned might ultimately affect the enforcement of the Township's zoning laws, it cannot be said, as a matter of law, that lobbying can, in any sense, be considered a power necessarily implied by the zoning power. And, as stated in *Kline v. Harrisburg*, 362 Pa. 438, 443-44, 68 A.2d 182, 184-85 (1949):

> Any fair, reasonable doubt as to the existence of power is resolved by the courts against its existence

---

3. Note that the taxpayers were considered the appellants at the common pleas level.

in the [municipal] corporation, and therefore denied.

The supervisors argue further that, because Section 2(1) of the Lobbying Registration Act (Act), Act of September 30, 1961, P.L. 1778, 46 P.S. §148.2(ii)(C) excepts employees of political subdivisions of the Commonwealth, who act in an official capacity, from the registration requirements for lobbyists, hiring a lobbyist and lobbying otherwise was proper for them and will not make them subject to surcharge. Admittedly, local government officials do visit the State Capitol for the sake of presenting the views of their communities to the legislature, and this type of activity is in no sense evil or pernicious; in most cases, it is probably laudable. The expenditures here, however, were never budgeted and as the trial judge said in his opinion, they represented *24% of the total administrative costs* of the Township in 1978. We fail to see how Section 2(1) of the Act can be construed so as to support the supervisors' position. Again, where doubt exists, courts must resolve the issue of implied powers against the local government. *Kline*.

The Supervisors also argue that Section 209.1 of the Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, 53 P.S. §10209.1, which gives a locally-created planning agency certain powers, *inter alia*, "promoting public interest in, and understanding of, the comprehensive plan and planning", authorizes their conduct. As provided in Section 202 of the MPC, 53 P.S. §10202, members of the planning commission[4] may be reimbursed for necessary and reasonable expenses." The supervisors here, however, have not offered sufficient evidence to prove that the expenses they incurred were "necessary and reasonable". And, under Section 559 of the Township Code, 53 P.S. §65559, the burden

4. Pursuant to Section 201 of the MPC, 53 P.S. §10201, the supervisors assigned these powers to themselves as "members appointed from the governing body" of the Township.

of proof lies upon the official whose accounts are in question, to establish the validity of charges. The supervisors here have failed to meet their burden, and further, as suggested by the taxpayers, to allow such expenditures without proof of the neccessity and reasonableness of these charges, and not having them provided for by the budget, would effectively nullify the budgeting provisions of the Township Code.

Lastly, the supervisors challenge the surcharge on Constitutional grounds in that it is said to violate their First Amendment[5] right to petition for redress of grievances, the provisions of Art. I, §§7 and 20 of the Pennsylvania Constitution relating to free speech and to their right to petition, and their due process rights under the Fourteenth Amendment.[6] The taxpayers' action here, however does not abridge the rights of the supervisors to speak their views on legislation or to seek redress of grievances; it is concerned instead with the unfettered expenditures by public officials who did not have any express or implied authorization for such expenditure. No one seeks to deny the supervisors their right to free speech; rather, it is merely argued that, if the supervisors wished to lobby in Harrisburg, they could have proposed such activity at a Township meeting, given the taxpayers of the Township notice of their plans, and sought a reasonable amount of funds for this purpose in the normal course of procedure. Regarding the due process argument, this contention was never raised below and therefore cannot be considered here. *Brose v. Easton Parking Authority*, 44 Pa. Commonwealth Ct. 24, 403 A.2d 178 (1979).

We will affirm the order of the trial court.

---

5. U.S. Const. amend. I.
6. U.S. Const. amend. XIV.

ORDER

AND, NOW, this 6th day of June, 1983, the order of the Court of Common Pleas of Bucks County in the above-captioned matter is hereby affirmed.

IN THE COURT OF
COMMON PLEAS OF BUCKS COUNTY

CIVIL

IN RE: APPEAL FROM THE SETTLEMENT AND AUDIT OF THE AUDITORS OF BUCKINGHAM TOWNSHIP, BUCKS COUNTY, PENNSYLVANIA, OF THE ANNUAL AUDIT AND FINANCIAL REPORT OF THE YEAR 1978	: NO. 79-6418-09-6

OPINION AND ORDER

RUFE, J., April 19, 1982.

In this appeal from Buckingham Township's Audit of 1978 brought by 19 citizens of Buckingham Township pursuant to Section 553 of the Second Class Township Code, 53 P.S. §65553, petitioners are seeking to surcharge respondent supervisors for lobbying expenses incurred by the Township in support of legislation during that year.

The facts stipulated and agreed by the parties establish that respondents Donald W. Parker and Paul Silver were duly elected supervisors of Buckingham Township holding office during 1978 when the challenged expenditures were made. They both approved, in their official capacities, the disbursements that are the subject of this appeal. The public funds at issue in the case, $35,743.23, were expended in connection with a successful effort to promote the passage of certain proposed legislation then pending in the Pennsylvania legislature under the designation "S.B. 1008." The purpose of the legislation was to amend the curative amendment provisions of the Pennsylvania Municipalities Planning Code in a manner affecting the zoning powers of local government bodies. The legislation amended the Municipalities Planning Code to require an affidavit by a person

filing a zoning challenge stating that the affiant had no knowledge of any proposed changes in municipal zoning before the application would be accepted. It grew out of and was introduced in direct response to the Pennsylvania Commonwealth Court's decision in the case of *Board of Supervisors of Buckingham Township v. Barness*, 33 Pa. Commonwealth Ct. 364, 382 A.2d 140 (1978), *cert. denied*, 439 U.S. 1116 (1979).[1]

In their successful support of S.B. 1008, the supervisors expended $35,743.23 of township funds, which expenditures were not included in the township's budget for 1978. Further, those expenditures represent 24% of the total administrative costs of the township for 1978, approximately 19% of the total governmental costs of the township for 1978, approximately 19% of the total costs for protection of persons and property for 1978, and approximately 24% of the total cost for police for 1978.

Section 545 of the Second Class Township Code, 53 P.S. §65545 provides, *inter alia:*

> Any elected or appointed officer, whose act, error or omission has contributed to the financial loss of any township, shall be surcharged by the auditors with the amount of such loss, and the surcharge of any such officer shall take into consideration as its basis, the results of such act, error or omission and the results had the procedure been strictly according to law.

---

[1] In the *Barness* case, the Commonwealth Court held that the advertisement of a notice of the adoption of a new comprehensive plan was not sufficient notice of the pendency of curative zoning legislation to challenging property owners. The Court denied the Board of Supervisors' contention that the landowners were "racing" new township zoning regulations as there was no advertisement of a proposed new zoning regulation when the challenges to the existing invalid ordinance and requests for curative amendments were filed.

Further, Section 559, P.S. §65559, provides that the accounts in question may be investigated de novo and the figures and facts found and stated by the auditors shall be taken as prima facie correct as against any such offer. In addition, Section 559 provides that the burden shall be upon each officer, whose accounts are in question, to establish the validity of the credits which he claims. *Appeal from Hazle Township Audit 1957*, 50 Luz. L. R. 69 (1969).

Petitioners basically raise two grounds supporting their surcharge petition. First, petitioners contend the amounts expended were not included in the budget for 1978 as required under Section 902 of the Second Class Township Code, 53 P.S. §65902. Therefore, the supervisors had no authority to spend the funds, even if for a proper purpose, hence surcharge is proper. Second, petitioners allege that respondents had no authority to expend the township funds for lobbying purposes, either under the Municipalities Planning Code or the Second Class Township Code, therefore a surcharge must be imposed.

As to petitioners' first contention, it is well settled that township supervisors will not be surcharged under Section 902 merely for authorizing expenditures in excess of the amount budgeted. *In re: Falls Township Audit*, 53 D.&C. 2d 705 (1971). In that opinion by Judge Bodley, this Court held that the amendments to Section 902 enacted July 10, 1947, P.L. 1481, sec. 11, and April 20, 1949, P.L. 634, sec. 1, made it clear that a budget is simply that: namely, a fiscal projection based upon past experience and upon anticipated future occurrences. The 1949 amendment stated that a budget should "reflect *as nearly as possible* the estimated revenues and expenditures . . . ." The court held that this is all that is every humanly possible. Merely showing spending in excess of the budget will not justify a surcharge. It must be shown that either the supervisors committed fraudu-

lent, collusive or dishonest acts, or the money was spent for other than proper township purposes. *Id.*

The crucial issue in this case is whether the expenditures of $35,743.23 for lobbying expenses were properly made within the respondents' authority as defined by the Second Class Township Code or under any other color of authority. While no Pennsylvania cases were found addressing the issue, we believe we can decide this case under the total scheme of the Second Class Township Code.

Generally, a municipal corporation is a creature of the sovereign and possesses only those powers granted in express words, and, those activities which the legislature has placed within its power. *Matter of Arbitration Between Borough of Ambridge and Police Department*, ____Pa. Commonwealth Ct. ____, 417 A.2d 291 (1980); *Golding v. New Britain Township*, 33 Pa. Commonwealth Ct. 635, 382 A.2d 509 (1978). Further, in *Warminster Township Auditors Report*, 22 Bucks Co. L. Rep. 143 (1972), affirmed 8 Pa. Commonwealth Ct. 163, 302 A.2d 859 (1973), Judge Monroe held:

> Nothing is better settled than that a municipal corporation does not possess and cannot exercise any other than the following powers: (1) those granted in express words; (2) those necessarily or fairly implied in or incident to the power expressly granted; (3) those essential to the declared objects and the purposes of the corporation, not simply convenient but indispensable. *Lesley v. Kite*, 192 Pa. 268, 274, 43 A.1102 (1899); *St. Joseph Lead Co. et al. v. Potter Township*, 398 Pa. 361, 364, 157 A.2d 638 (1959); *Com. v. Hanzlik*, 400 Pa. 134, 136, 161 A.2d 340 (1960); *Chapman v. Vandergrift Borough*, 26 Dist. Rep. 301 (1916). *Id.* at 153.

In addition, any fair and reasonable doubt as to the existence of power is resolved by the courts against the existence of that power in the corporation and is therefore

denied. *Knauer v. Commonwealth*, 17 Pa. Commonwealth Ct. 360, 332 A.2d 589 (1975); *Pettit v. New Britain Twp.*, 28 Bucks Co. L. Rep. 80 (1975).

In the instant matter, for the most part, the facts are undisputed. The significant question before the court relates to the legal consequences of the supervisors' acts and whether or not they were in strict conformance with the law, so as to make them liable for surcharge. *Cotlar v. Warminster Township*, 8 Pa Commonwealth Ct. 163, 302 A.2d 859 (1973). Respondents contend that although there is no express authority conferred in the Second Class Township Code, the expenditures are justified as incident to various powers expressly stated in the Code.

Respondents cite Section 725 of the Second Class Township Code, 53 P.S. §65725 for this proposition. Section 725 grants the township the power to adopt and enforce zoning ordinances, regulating the location, construction, and use of buildings, the size of courts and open spaces, the density of population, and the use of land. We cannot conceive how this impliedly authorizes the expenditure of township funds for lobbying purposes, even if the proposed legislation does remotely affect the enforcement of zoning ordinances.

Further, respondents contend that Section 610 of the Code, 53 P.S. §65610, which authorizes the formation of a State Association of Township Supervisors, justifies the expenditures for lobbying. The Association functions include advancing the interest of and betterment of township government in townships of the second class. Article II, Section 6, of the Association's By-Laws provides that one of the purposes of the Association is to secure from the General Assembly legislation which will enable Township Government to function more efficiently. The Second Class Township Code provides for the payment of dues to the Association by the township. We agree with the respondents that this section evidences the intent of the legislature to

encourage the involvement of local governmental bodies in shaping policies. However, we also hold that the legislative intent was to limit the lobbying involvement of local governmental bodies to that provided in the Code, that is, to the lobbying activities of the Association. The record establishes that the Township paid dues to the Association which then presumably applied the dues toward Association expenses, among which were lobbying.

We consider as further evidence of the legislative intent, the fact that there is no further authority in the Code, whether express or implied, for the expenditures in question. In direct contradiction to this situation is the fact that the Code otherwise goes into great detail to dictate those circumstances in which expenditures may be made by the township. For example, specific sections dictate when township funds may be spent for street lights, fire hydrants, fire fighting equipment, construction of ponds, Memorial Day appropriations, garbage collection, traffic control devices, etc. We hold that with such specific and detailed statutory instructions, the Pennsylvania legislature has dictated what township funds may be spent for. No such authority for lobbying expenditures is either expressly stated or can be fairly implied in the powers granted in the Code. Further, we hold that no such power is incidental or indispensable to the powers granted or to the objects and purposes of the township. Without such authority, the supervisors were acting improperly in making the expenditures and surcharge is proper.

Surcharge has been imposed in cases in which supervisors have had a much more colorable claim to legislative authority for their actions. In *South Union Twp. Board of Auditors v. South Union Twp. Board of Supervisors*, 75 D.&C.2d 324 (1976), the court held that while supervisors of a second class township are authorized to contract with an insurance company for payment of premiums to purchase annuities, payment of an amount directly to an employee to enable him to provide

a pension in such manner as he himself should determine, was beyond their power, and surcharge was proper. The court held that even though the money might have been used for the purpose for which it was intended, the supervisors had no authority to make a direct distribution.

In *Warminster Township Auditors' Report*, 22 Bucks Co. L. Rep. 143 (1972), affirmed 8 Pa. Commonwealth Ct. 163, 302 A.2d 859 (1973), supervisors claimed that they had authority under the Code to engage themselves as compensable township employees in the general conduct of the business of the township. The court held that the supervisors had no authority to vote themselves and receive the additional compensation as township employees since their compensation was limited to that provided by statute. The court concluded that since the supervisors acted without authority, a surcharge was proper, despite the fact that the supervisors acted entirely in good faith and there was no financial loss to the township.

We believe the supervisors here acted in good faith and without fraud in spending township funds for what they thought was a proper township purpose. However, their acts were unlawful in nature and they must remit to the township the funds so expended.

The amount of the surcharge, $35,743.23, is taken directly from Footnote #1 of the report of the Board of Auditors. The footnote computes the surcharge as follows:

Consulting Services	$36,565.95
Buckingham Day Expenses (Fundraiser to defray costs of lobbying)	4,495.28
	$42,061.23
Less Revenues Received By Township for Buckingham Day	6,318.00
NET DUE TOWNSHIP	$35,743.23

Section 559 of the Second Class Township Code, 53 P.S. §65559, provides that the figures found and stated by the auditors in their report shall be taken as prima facie correct as against any such officer and the burden shall be upon each officer to establish the validity of the credits which he claims. We hold that as the respondents have failed to meet their burden of proof by contradicting this figure, the amount above stated is true and correct.

Accordingly, we enter the following:

ORDER

AND NOW, this 19th day of April, 1982, it is hereby ORDERED and DECREED that Donald W. Parker and Paul Silver are subject to surcharge jointly and severally in the amount of $35,743.23 for monies unlawfully paid from the funds of Buckingham Township.

The prothonotary is directed to enter judgment in favor of the Township of Buckingham and against Donald W. Parker and Paul Silver in the amount of $35,743.23.

By the Court,

/s/William Hart Rufe, III, *J.*

[Appealed to Commonwealth Court.]

IN THE COURT OF
COMMON PLEAS OF BUCKS COUNTY

CIVIL

IN RE: APPEAL FROM THE	:	NO. 79-6418
SETTLEMENT AND AUDIT OF THE	:	
AUDITORS OF BUCKINGHAM	:	
TOWNSHIP, BUCKS COUNTY,	:	
PENNSYLVANIA, OF THE ANNUAL	:	
AUDIT AND FINANCIAL REPORT OF	:	
THE YEAR 1978	:	

ADDITIONAL OPINION

I do not condone the actions of the supervisors in question. I also find that Judge Rufe's thorough analysis accurately follows present statutory and case law authority. However, I am concerned that the procedures required by that statutory and case law by which surcharge has been imposed in this case are constitutionally infirm or at the very least implicate constitutional questions of due process which the parties have inadequately addressed.

Consider the procedure required under the act and case authority in light of the circumstances of this case. The burden of proof and persuasion as to the validity of the expenditures is upon the supervisors. Their good faith, including reliance upon the Township's duly appointed solicitor, counts for absolutely nothing. It is conceded that their sole purpose was to benefit the Township. Their efforts were ultimately successful and no one has urged that they were not beneficial to the Township. No fraud is alleged and no financial benefit was received by them. Nonetheless in an action the Commonwealth Court has determined[1] to be "civil" and "remedial" in

1. *In re Appeal From Report of Audit of South Union Township for 1975. Appeal of Auditors of South Union Township v. Nicholas Komanecky and James Conway. Appeal of Auditors of South Union Township,* Pa. Commonwealth Ct. , 407 A.2d 906 (1979).

nature and in which they have no right to a trial by jury, they are required to pay $35,743.23 to the Township in the nature of a surcharge. The amount of surcharge obviously goes beyond personal financial inconvenience perhaps to the point of bringing about the financial ruin of the surcharged supervisors.

No matter how the action may be *characterized*, the *consequences* amount to a penalty including loss of property for improper conduct in making expenditures unauthorized by law. Under those circumstances elemental fairness and constitutional due process require that those who seek surcharge bear the burden of proof and persuasion rather than the supervisors against whom surcharge is sought. There may be other procedural due process problems as well, as, for example, the unavailability of any good faith defense. Additionally, the procedures in surcharge apparently do not permit the joinder of more directly responsible parties such as, in this instance, the Solicitor who advised that the expenditure could be legally made.

I regret that I am constrained to file this opinion. I believe Judge Rufe's analysis is quite consistent with statutory and case law. I realize that the constitutional issues which this opinion raises have not been adequately addressed by the parties. I appreciate that our Court must be prudent and cautious in raising constitutional issues sua sponte, and that doing so is discouraged by our appellate courts. Nonetheless, I do not believe that we can be insensitive to the requirements of due process in light of the draconian results in this case.

_____

Edward G. Biester, Jr. *J.*

Dated:

Commonwealth of Pennsylvania
Lobbying Registration Act

46 Pa. Stat. Ann. §148.2 (Supp. 1983-1984). Definitions.

"Lobbyist" means any natural person who:

(i) Is employed or engaged for compensation, by any other person or any partnership, committee, association, corporation or any other organization to lobby.

(ii) Makes expenditures or incurs obligations on behalf of any one person he represents in excess of three hundred dollars ($300) in any calendar month except that a natural person shall not be considered a lobbyist when he:

(A) Formally communicates with or formally presents testimony before an agency of the Commonwealth or the General Assembly.

(B) Testifies before a committee of the General Assembly.

(C) Is an officer, official or employe of the Commonwealth of Pennsylvania or any political subdivision thereof and is acting in his official capacity.

Commonwealth of Pennsylvania
Municipalities Planning Code

53 Pa. Stat. Ann. §10201 (1972). Creation of planning agencies.

The governing body of any municipality shall have the power to create or abolish, by ordinance, a planning commission or planning department, or both. An ordinance which creates both a planning commission and a planning department shall specify which of the powers and duties conferred on planning agencies by this act; [punctuation sic] each shall exercise and may confer upon each additional powers, duties and advisory func-

tions not inconsistent with this act. In lieu of a planning commission or planning department, the governing body may elect to assign the powers and duties conferred by this act upon a planning committee comprised of members appointed from the governing body. The engineer for the municipality, or an engineer appointed by the governing body, shall serve the planning agency as engineering advisor.

53 Pa. Stat. Ann. §10202 (1972). Planning Commission.

If the governing body of any municipality shall elect to create a planning commission, such commission shall have not less than three nor more than nine members. All members of the commission shall serve without compensation, but may be reimbursed for necessary and reasonable expenses. However, elected or appointed officers or employes of the municipality shall not, by reason of membership thereon, forfeit the right to exercise the powers, perform the duties or receive the compensations of the municipal offices held by them during such membership.

53 Pa. Stat. Ann. §10209.1 (1972 & Supp. 1983-1984). Powers and duties of planning agency.

(b) The planning agency at the request of the governing body may:

. . .

(8) Promote public interest in, and understanding of, the comprehensive plan and planning;

(9) Make recommendations to governmental, civil and private agencies and individuals as to the effectiveness of the proposals of such agencies and individuals.

Commonwealth of Pennsylvania
Second Class Township Code,
Article IX, Taxation and Finance

53 Pa. Stat. Ann. §65902 (1957 & Supp. 1983-1984). Annual Budget.

A. (1) The board of township supervisors shall annually, at least thirty days prior to the adoption of the annual budget begin preparation of a proposed budget for all funds or annual estimate of revenues and expenditures for the ensuing fiscal year, beginning on the first day of January, which shall be filed with the treasurer. Said budget shall reflect as nearly as possible the estimated revenues and expenditures of the township for the year for which the budget is prepared. . . .

(2) Upon the preparation of the proposed budget, the supervisors shall give public notice by advertisement once in at least one newspaper of general circulation in the township or county that the proposed budget will be available for public inspection at a designated place in the township. After the budget has been available for public inspection for twenty days the supervisors shall, after making such revisions therein as appear advisable, adopt the budget not later than the thirty-first day of December and the necessary appropriation measures required to put it into effect.

. . .

(4) The supervisors may at any time by resolution make supplemental appropriations for any lawful purpose from any funds on hand or estimated to be received within the fiscal year and not otherwise appropriated, including the proceeds of any borrowing authorized by law. Such supplemental appropriations may be made whether or not an appropriation for the same purpose was included in the original budget as adopted, except that no supplemental appropriation shall be made for any purpose in respect to which the court on an appeal

pursuant to section nine hundred eight of this act has ordered a specific reduction or elimination of an item of the original budget for the same purpose.

53 Pa. Stat. Ann. §65902.2 (Supp. 1983-1984). Amending budget; notice.

During the month of January next following any municipal election, the supervisors of any township may amend the budget and the levy and tax rate to conform with its amended budget. A period of ten days' public inspection at the office of the township secretary of the proposed amended budget after notice by the township secretary to that effect is published once in a newspaper as provided by section 110 of this act shall intervene between the proposed amended budget and the adoption thereof. Any amended budget must be adopted by the township supervisors on or before the fifteenth day of February. . . .

Office - Supreme Court, U.S.
FILED
FEB 15 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1166

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

PAUL SILVER and DONALD W. PARKER,
Petitioners,

vs.

JOHN C. BENSON, JR., *et al.*,
Respondents.

BRIEF IN OPPOSITION TO CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert W. Valimont
William E. Benner
Anita F. Alberts
POWER, BOWEN & VALIMONT
102 North Main Street
Doylestown, Pennsylvania 18901
(215) 345-7500
Attorneys for Respondent Taxpayers

Batavia Times Publishing Co.
Edward W. Shannon
Philadelphia, Pa. (215) 232-8181

COUNTERSTATEMENT OF QUESTION PRESENTED

May elected officials be required to remit misspent public funds to municipal treasuries pursuant to state law permitting surcharge for unauthorized expenditures?

The question stated by Petitioners seeking certiorari has never before been raised in this case. The Petition does not comply with Supreme Court Rule 21.1(h), as it does not, and cannot, set forth any stage in the proceedings where Petitioners' stated federal question was raised.

TABLE OF CONTENTS.

	Page
Counterstatement of Question Presented	i
Table of Authorities	iii
Counterstatement of Opinions Below	1
Lack of Jurisdiction	2
Statutes Involved	2
Counterstatement of the Case	3
Reasons for Denying the Writ	7
I. The Court Should Not Review This Case Because It Presents No Federal Question Within The "Case Or Controversy" Requirement Of Article III Jurisdiction	7
II. This Case Should Not Be Reviewed Because The State Court Has Not Decided A Federal Issue In A Way In Conflict With Applicable Decisions Of This Court	10
Conclusion	16

Page

TABLE OF AUTHORITIES.

Cases:

Anderson v. Boston, 380 N.E.2d 628 (1978), *appeal dismissed*, 439 U.S. 1060 (1978) 13
Barker v. Carr, 369 U.S. 186 (1962) 10
Bell v. New Jersey and Pennsylvania, _____ U.S. _____, 76 L. Ed. 2d 312 (1983) 13
Board of Supervisors of Buckingham Township v. Barness, 33 Pa. Commonwealth Ct. 364 (1978), *rearg. denied* February 28, 1978, *allocatur denied* July 3, 1978, *cert. denied* 439 U.S. 1116 (1979) 4
Buckley v. Valeo, 424 U.S. 1 (1976) 12
Cammarano v. United States, 358 U.S. 498 (1959) .. 10,11
Campbell v. Joint District 28-J, 704 F.2d 501 (10th Cir., 1983) 13,14
Commonwealth *ex rel.* Specter v. Moak, 452 Pa. 482 (1973) 14,15
Eastern Railroad Presidents v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 12
Gilfellan v. City of Philadelphia, 480 F.Supp. 1161 (E.D.Pa. 1979), affirmed 637 F.2d 924 (3d Cir., 1980), *cert. denied* 101 S. Ct. 2322 (1981) 9
Harris v. McRae, 448 U.S. 297 (1980) 12
Herb v. Pitcairn, 324 U.S. 117, 65 S. Ct. 459 (1945) 8
Lynch v. New York, 293 U.S. 52, 55 S. Ct. 16 (1934) 9
Meyers and Robbins t/a Best Homes v. Board of Supervisors of Lower Makefield Township, 43 Pa. Commonwealth Ct. 196 (1979) 4,5
Michigan v. Long, _____ U.S. _____, 103 S.Ct. 3469 (1983) 8

Page

Regan v. Taxation With Representation, _____ U.S. _____, 76 L. Ed. 2d 129 (1983) 11,12
Steffel v. Thompson, 415 U.S. 452 (1974) 10
Warth v. Seldin, 422 U.S. 490, 95 S.Ct 2197, 45 L. Ed. 2d 343 (1975) 9,10

Statute:

Second Class Township Code of the Commonwealth of Pennsylvania:
53 Pa. Stat. Ann. §65101 *et seq.* 3,5
53 Pa. Stat. Ann. §65545 2,4
53 Pa. Stat. Ann. §65610 3,5
53 Pa. Stat. Ann. §65612 3,5

IN THE

Supreme Court of the United States

October Term, 1983

No. 83-1166

PAUL SILVER and DONALD W. PARKER,
Petitioners,

vs.

JOHN C. BENSON, JR., *et al.*,
Respondents.

BRIEF IN OPPOSITION TO CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

Respondent taxpayers John C. Benson, Jr., *et al.* respectfully request that certiorari be denied and the judgment of the Commonwealth Court of Pennsylvania entered in the above matter not be reviewed.

COUNTERSTATEMENT OF OPINIONS BELOW

The "Additional Opinion" filed by the Honorable Edward G. Biester, Jr., of the Court of Common Pleas of Bucks County is improperly reprinted in Petitioners' Appendix, at A(15). It is not part of the record. Its author did not participate in the hearing or decision of

this case and his "Opinion" has no weight or bearing on this proceeding.

The Opinion and Order of the Commonwealth Court of Pennsylvania and of the Court of Common Pleas of Bucks County, Pennsylvania are reprinted in the Appendix to Petitioners' Brief.

LACK OF JURISDICTION

This case presents no Federal question. It was decided under a Pennsylvania statute whose constitutionality has not been subject to attack. Further, Petitioners have no personal stake in determination of the "question" they frame. Petitioners seek an advisory opinion based upon a hypothetical issue. There is, therefore, no case or controversy within Article III jurisdiction. Petitioners' statement of the case does not conform to Supreme Court Rule 21.1(h). The question stated by Petitioners has not been raised before in these proceedings so as to give this Court jurisdiction to review the judgment on Writ of Certiorari. The Petition is therefore subject to denial pursuant to Supreme Court Rule 21.5.

STATUTES INVOLVED

The statutory provisions involved include Section 545 of the Second Class Township Code of the Commonwealth of Pennsylvania, 53 Pa. Stat. Ann. §65545 (Supp. 1983-1984), which provides in pertinent part:

> Any elected or appointed officer, whose act, error or omission has contributed to the financial loss of any township, shall be surcharged by the auditors with the amount of such loss, and the surcharge of any such officer shall take into consideration as its basis, the results of such act, error or omission and the results had the procedure been strictly according to law.

The Second Class Township Code of Pennsylvania, 53 Pa. Stat. Ann. §65610 (Supp. 1983-1984) provides in pertinent part:

> The formation of a State Association of Township Supervisors is hereby authorized . . . The Association shall function under these bylaws for advancing the interest of and betterment of township government in townships of the second class . . . The dues adopted in these bylaws are legal expenditures of the townships and are to be used to pay for the services, publications and other expenses . . . for Association purposes and activities authorized by the Association or incurred in behalf of the Association by its officers and executive committee . . .

The Second Class Township Code of Pennsylvania, 53 Pa. Stat. Ann. §65612 (Supp. 1983-1984) provides in pertinent part:

> "The expenses allowed the delegates attending the annual meeting may be in an amount not exceeding $75 per day for each delegate for not more than four days including the time employed in traveling thereto and therefrom, together with mileage going to and returning from such meeting.

COUNTERSTATEMENT OF THE CASE

Petitioners, Paul Silver (Silver) and Donald W. Parker (Parker) were elected Township Supervisors of Buckingham Township, Bucks County, Pennsylvania. Under Pennsylvania law, Township Supervisors have only those powers delegated to them by the Pennsylvania General Assembly as contained in the Second Class Township Code of the Commonwealth of Pennsylvania, 53 Pa. Stat. Ann. §65101 *et seq.* Further, under Pennsylvania law, if township supervisors make expenditures unauthorized by law, they may be

surcharged pursuant to 53 Pa. Stat. Ann. §65545. In this instance, Parker and Silver as township supervisors spent $35,743.23 of township revenues, paid to a lobbyist in an attempt on their part to influence Pennsylvania legislators to enact legislation designed to reverse the effect of a decision of Pennsylvania's Commonwealth Court. Contending the expenses were improper, certain Buckingham Township taxpayers instituted suit to compel Silver and Parker to reimburse the local treasury for the lobbying expenditure.

This taxpayers' suit was prompted by a report of Buckingham Township Auditors, who found municipal fiscal records in chaos. For example, the township's General Fund checkbook for 1978 had been discontinued from June 1 through December 31, 1978 (R. 19a), with numerous deposits and expenditures not recorded. Ledger receipts fell short of bank statements and many "unaccounted expenditures" for "general government administration" were found. The auditors discovered that money had been transferred between accounts for use in an extraordinary, unbudgeted lobbying campaign, but most expenses were not documented. The auditors isolated $35,743.23 spent by Parker and Silver on lobbying activities. Petitioners' avowed purpose was to obtain legislation to retroactively deny the remedy granted by Pennsylvania Courts to landowners who successfully challenged Buckingham Township's zoning ordinance as being unconstitutionally exclusionary. See *Board of Supervisors of Buckingham Township v. Barness*, 33 Pa. Commonwealth Ct. 364 (1978), *rearg. denied* February 28, 1978, *allocatur denied* July 3, 1978, *cert. denied* 439 U.S. 1116 (1979). Although the Pennsylvania Legislature adopted the legislation, the Legislature was held inapplicable to the *Barness* case, in *Meyers and Robbins, t/a Best Homes v. Board of Supervisors of Lower Makefield Township*, 43 Pa.

Commonwealth Ct. 196 (1979). Petitioners' extraordinary expenditures therefore had no impact on Buckingham Township.

Significantly, at no time in the history of these proceedings have Petitioners challenged the constitutional validity of any Pennsylvania statute. Instead, Parker and Silver raise here for the first time the academic question whether the application of a state statute in effect chills the free exercise of the Municipality's First Amendment rights. Yet the record shows no such chilling.

The Commonwealth Court of Pennsylvania specifically found no abridgement of the First Amendment rights of the individual Petitioners, Silver and Parker. (See Commonwealth Court Opinion, Petitioners' Appendix, A-5.) Petitioners now abandoned that claim and seek to raise for the first time alleged First Amendment rights of the Municipality.

Pennsylvania's Second Class Township Code, 53 P.S. 65610, *et seq.*, authorized formation of the Pennsylvania State Association of Township Supervisors (PSATS), which functions as a lobbying organization "to secure from the General Assembly of Pennsylvania legislation which will enable township government to function more efficiently" (R. 80a). Petitioners argued below that in 1978 PSATS "was unable to engage in extensive lobbying" on behalf of the legislation they supported; they then undertook the lobbying campaign, using local tax revenues already budgeted for other purposes (R. 67a, ¶11). Pennsylvania law, 53 P.S. 65612, allows municipal officials attending PSATS meetings to be reimbursed for expenses up to $75 per day for four days plus mileage. Dues of municipal officials attending PSATS meetings may be paid from public funds under 53 P.S. 65610. Parker and Silver exceeded expenditures allowed from township funds by more than $35,000.

Parker personally testified before the Pennsylvania House of Representatives Local Government Committee (R. 61a. ¶13). His expenses were properly paid from public funds as permitted by state law. Petitioners also attended PSATS meetings. Never has there been any claim of abridgement of speech.

Parker and Silver diverted $35,700 of taxpayers' money budgeted for other purposes, to subsidize their own personal lobbying crusade to change state law. The issue, therefore, is not whether a municipal corporation accountable to the electorate is endowed with First Amendment rights comparable to those of private corporations accountable to shareholders. The issue is whether the public must be compelled to finance Petitioners' lobbying crusade. Parker and Silver now argue in their Brief (page 4, fn. 4) Mr. Parker filed for personal bankruptcy in 1981, yet acknowledge (page 11, fn. 9) available insurance purchased with public funds. The estate of debtor Parker is unaffected by this case. The treasury of Buckingham Township, however, has been depleted and must be reimbursed.

REASONS FOR DENYING THE WRIT

I. The Court Should Not Review This Case Because It Presents No Federal Question Within The "Case Or Controversy" Requirement Of Article III Jurisdiction.

In their zeal to present a federal question, *i.e.* whether municipal corporations are endowed with First Amendment rights comparable to those of private corporations, Petitioners have clearly demonstrated this case is not a proper choice for review. Not only was this question never raised in the five year history of this litigation; it has no direct bearing on the facts of this case, because there has been no abridgement of municipal or official speech.

This is an action for surcharge of municipal officials for fiscally irresponsible, illegal and improper expenditure of $35,743.23 from the Buckingham Township treasury. The expenditure was also outside budgetary procedures mandated by Pennsylvania law. Accountability and fiscal responsibility of elected public officials is the issue here. First Amendment freedoms of the citizenry must not be chilled or limited by government domination of protected speech through use of public funds for lobbying to advance views held by some officials while forcing dissenting taxpayers to finance the opposition.

Supreme Court Rule 17.1 provides that review on Writ of Certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The character of reasons considered for certiorari include: (a) when a federal court of appeals has rendered a decision conflicting with another federal appellate court on the same matter; or has decided a federal question so as to conflict with a state court of last resort; or has so far

departed from accepted practice as to call for an exercise of this Court's power of supervision; or (b) when a state court of last resort has decided a federal question in a way conflicting with the decision of another state court of last resort or of a federal court of appeals; or (c) when a state or federal appellate court has decided an important question of federal law which should be settled by this court or has decided a federal question in a way conflicting with applicable decisions of this Court.

None of these reasons for certiorari to review the decision of the Pennsylvania Commonwealth Court exist in this case. Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground. *Michigan v. Long*, _____ U.S. _____, 103 S. Ct. 3469 (1983). This principle is based on the jurisdictional concern that this Court should not render an advisory opinion. If the same judgment would be rendered by the state court under state law after this Court corrected its views of federal laws, this Court's review would amount to nothing more than an advisory opinion. *Herb v. Pitcairn*, 324 U.S. 117, 65 S. Ct. 459 (1945). This is such a case. Examination of the record demonstrates that all rights were determined upon a state statute whose constitutionality is not in question.

Pennsylvania courts are familiar with the legislative scheme permitting municipal lobbying at minimal public cost through the PSATS and payment of officials' expenses. Pennsylvania has provided a proper and adequate mechanism for making municipalities' views known to the legislature. Statutes cited by Petitioners and opinions of the courts below demonstrate judicial acknowledgment of Pennsylvania's legitimate

governmental interest in assuring fiscal responsibility of municipal officials through mandated budgeting procedures and carefully regulated local spending power. Where a judgment does not depend upon a decision of any federal question, the Supreme Court has no power to disturb it. *Lynch v. New York*, 293 U.S. 52, 55 S.Ct. 16 (1934).

By claiming for the first time that this case presents an undecided issue of First Amendment rights of municipal corporations, Petitioners are masking the real issue of the right of the state to require fiscal responsibility of elected officials. Petitioners have so contorted the issues that it is difficult to recognize Respondent taxpayers' representation of municipal interests in seeking reimbursement of the township treasury. Reduced to its simplest, Parker and Silver contend that unless unbudgeted and unauthorized lobbying expenses are permitted, the first Amendment rights of municipal corporations will be "chilled".

Petitioners lack standing to assert this right for the municipality because they have alleged no abridgement or content regulation of municipal speech, and because they have no personal proprietary interest in the public funds they misused. They lack the requisite "personal stake" in determination of the issue they raise. See generally, *Warth v. Seldin*, 422 U.S. 490, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). That there is no municipal party to this litigation must not be overlooked. To the extent municipal interests are represented here, Respondent taxpayers have proper standing to represent them, by challenging improper spending of local tax funds. *Gilfellan v. City of Philadelphia*, 480 F.Supp. 1161 (E.D.Pa. 1979), *aff.* 637 F.2d 924 (3d Cir., 1980), *cert. denied* 101 S. Ct. 2322 (1981).

By attempting to assert First Amendment rights of municipalities, Parker and Silver have alleged a remote and abstract issue. They ignore the very real danger of governmental domination of protected speech if unfettered spending of public funds were allowed. They allege no state abridgement of speech, no regulation of the content of municipal speech. They challenge no state statute limiting municipal spending power. The question they present is a non-justiciable, generalized issue incapable of adjudication in the context of this litigation. To seek relief in a federal court, a party must demonstrate existence of an "actual controversy" within the meaning of Article III of the United States Constitution. *Steffel v. Thompson*, 415 U.S. 452 (1974). There must be a concrete adverseness between the parties to sharpen presentation of issues and enable the Court to fashion relief. *Baker v. Carr*, 369 U.S. 186 (1962). When the harm complained of is a generalized grievance, it does not warrant the exercise of federal jurisdiction. *Warth v. Seldin, supra.* Parker and Silver cannot achieve standing to litigate municipalities' First Amendment rights by challenging a surcharge properly imposed under a state law whose constitutionality has not been challenged, where there is no record whatsoever of any limiting of municipal or official speech.

II. This Case Should Not Be Reviewed Because The State Court Has Not Decided A Federal Issue In A Way In Conflict With Applicable Decisions Of This Court.

Cammarano v. United States, 358 U.S. 498, 79 S.Ct. 524 (1959) held that Congress is not required by the First Amendment to subsidize lobbying. In *Cammarano*, this Court held Congress did not infringe any First Amendment rights or regulate any First Amendment

activity in enacting treasury regulations providing that money spent by individual or corporate taxpayers for promotion or defeat of legislation is not deductible from gross income. Here, Parker and Silver contend that because they are subject to surcharge, their or the municipality's free speech is chilled. This is not the case. Parker and Silver could, under state law, lobby as much as they might desire. The difference is, however, that the public has the right not to be compelled to pay for their efforts.

In *Regan v. Taxation With Representation*, _____ U.S. _____, 103 S.Ct. 781, 76 L.Ed.2d 129 (1983), this Court held a prohibition against lobbying for tax exempt status was constitutional. In *Regan*, as in *Cammarano*, it was recognized that Congress had simply chosen not to pay for or subsidize lobbying through tax exemptions. This Court again rejected the notion that First Amendment rights are somehow not fully realized unless they are subsidized by the state, citing *Cammarano*, 358 U.S. at 515. The *Regan* court upheld Congressional refusal to pay for lobbying out of public monies, stating, "this Court has never held that Congress must grant a benefit such as TWR (Taxation with Representation) claims here to a person who wishes to exercise a constitutional right." _____ U.S. _____, 76 L.Ed.2d at 137. In unanimously reversing the Court of Appeals of the District of Columbia, the *Regan* court stated, "Congress could, for example, grant funds to an organization dedicated to combatting teenage drug abuse, but condition the grant by providing that none of the money received from Congress should be used to lobby state legislatures. Under *Cammarano*, such a statute would be valid." 76 L.Ed.2d 138-139. Legislative power to select particular entities or persons for entitlement to appropriations or tax exemptions is a matter of policy and discretion not open to judicial review, absent extraordinary circumstances which do not exist here.

This Court has held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe upon that right, and thus is not subject to strict scrutiny. *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612 (1976), cited in *Regan, supra*. *Buckley* upheld a statute providing federal funds for candidates for public office in primary campaigns but which did not provide funds for candidates who do not run in party primaries. First Amendment and equal protection challenges were rejected by this Court without applying strict scrutiny. The reasoning is simple: Although government may not place obstacles in the path of a person's exercise of freedom of speech, it need not remove obstacles not of its own creation. *Harris v. McRae*, 448 U.S. 297 (1980). Although Parker and Silver might not have had as much money as they wished, without using public funds, and could not have spoken as much as they would have liked, the Constitution does not confer an entitlement to such funds as may be necessary to realize the maximum advantages of their freedom. *Harris, supra*, at 318.

The issue in this case is not whether Parker and Silver, or Buckingham Township for that matter, may lobby. The issue is also not whether the Pennsylvania Legislature is required to provide public money to lobby, beyond limits contained in Pennsylvania's Second Class Township Code. While lobbying is protected by the First Amendment, *Eastern Railroad Presidents v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523 (1961), there is no constitutional mandate requiring state legislatures to subsidize municipal lobbying to the point of abuse of local spending power, bypassing mandatory budgetary requirements. The issue is the right of the state to exact fiscal responsibility from its public servants by requiring surcharge for unbudgeted and unauthorized expenditures from the public coffers.

Bell v. New Jersey and Pennsylvania, _____ U.S. _____, 76 L. Ed. 2d 312 (1983), held, after an audit, that New Jersey and Pennsylvania had misapplied federal funds and the United States treasury was entitled to recoup those misspent funds even in the absence of specific statutory direction. This Court held the federal government may recover misused funds.

Pennsylvania's courts have recognized the right of Buckingham Township's treasury to recover misspent public funds. The determination has been made wholly under explicit state law and is completely consistent with the holdings of this Court.

Further, the holding is consistent with action of this Court in *Anderson v. Boston*, 380 N.E.2d 628 (1978), *appeal dismissed*, 439 U.S. 1060 (1978), which held a municipality had no authority to appropriate funds to influence the result of a state referendum, and the First Amendment did not prohibit the state's denial to the City of Boston of the power to spend funds to influence a referendum. The state court in *Anderson* acknowledged "Constitutional restrictions on governmental speech even where the subject under discussion is at the heart of First Amendment protection," 380 N.E.2d at 637, and observed that governmental domination of the expression of ideas is repugnant to our system.

The decision below is also in harmony with holdings of the Circuit Courts of Appeal which have addressed municipal lobbying. *Campbell v. Joint District 28-J*, 704 F.2d 501 (10th Cir., 1983), held neither a city nor a joint school district had authority under Colorado law to spend public funds in connection with a referendum proposal to amend the state constitution regarding elector approval of tax measures. *Campbell* held use of public funds to finance opposition to the proposed

constitutional amendment was unauthorized and unlawful, and required reimbursement of those funds to the treasuries from which they were obtained.

Campbell dealt with a state statute, the Campaign Reform Act, which specifically prohibited expenditures by any state agency or political subdivision in election campaigns, but which permitted contributions to campaigns involving only issues in which agencies or municipalities had "an official concern," after specific approval by the governing body. The school district argued the ballot measure involved was an "official concern" because it proposed to limit methods for increasing taxes. Determination of the "official concern" issue turned on whether the question would ever come before the agency for an official decision. A change in the taxing scheme would not cross these local officials' desks for approval; the referendum was therefore not an official concern. They had spent public monies in an area beyond their official responsibility, and were required to remit the misspent funds.

Petitioners' contention that they should not be held accountable for misspent funds because they acted in good faith lacks merit. Good faith or mistaken reliance upon an incorrect legal advisor is no justification for misuse of public money. Nor is an alleged good faith defense an issue meriting constitutional interpretation by this Court.

By using taxpayers' money to subsidize their own personal viewpoints, Parker and Silver abused their offices to deprive Buckingham Township citizens of a fiscally responsible local government. Pennsylvania's Supreme Court, in *Commonwealth ex rel. Specter v. Moak*, 452 Pa. 482 (1973) upheld limitations upon First Amendment rights of public officials and employees in

order to protect the interests of private citizens. *Specter* held state interests in regulating activities of its officials differ significantly from regulation of the citizenry in general, so as to balance the interests of the official in commenting upon matters of public concern with the interest of the state in promoting efficiency of public services.

The budgetary procedure mandated by Pennsylvania law but bypassed by Parker and Silver is structured to allow free public discussion of expenditures, because citizens have a right to know how their tax money is being used. Parker and Silver never told them. They spoke at public meetings (R. 64a, 65a, 95a and 96a), but they never discussed these expenditures. Taxpayers never knew the nature or extent of Petitioners' lobbying campaign expenditures. They hired a lobbyist, paid him a salary, and covered his expenses. None of these types of expenditures are authorized under Pennsylvania law.

This case presents no question of abridged speech for municipal corporations or officials. Petitioners used public money to lobby for passage of a statute to deprive landowners of a judicially authorized remedy under state zoning law. Since such expenditures are not authorized under Pennsylvania law, surcharge is the proper remedy.

CONCLUSION

The Commonwealth Court's holding in this case properly surcharged Petitioners for misspending public money in contravention of Pennsylvania law. There is no federal question presented, for there has been no abridgement or regulation of the content of speech of municipal corporations. Pennsylvania's Legislature is not required to subsidize municipal officials' lobbying in derogation of the substantial state interest in exacting fiscal accountability from elected local officials. This is not a proper case for discretionary review on certiorari.

Respectfully submitted,

ROBERT W. VALIMONT
WILLIAM E. BENNER
ANITA F. ALBERTS
POWER, BOWEN & VALIMONT
102 North Main Street
Doylestown, Pennsylvania 18901
(215) 345-7500

Attorneys for Respondent Taxpayers

Dated: February 15, 1984

MOTION FILED
FEB 15 1984

No. 83-1166

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

PAUL SILVER
and
DONALD W. PARKER,
Petitioners

v.

JOHN C. BENSON, JR., et al.,
Respondents

On Petition for Writ of Certiorari to the Commonwealth Court of Pennsylvania.

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

AND

BRIEF OF PENNSYLVANIA STATE ASSOCIATION OF TOWNSHIP SUPERVISORS AND NATIONAL ASSOCIATION OF TOWNS AND TOWNSHIPS AS AMICI CURIAE

Thomas L. Wenger
Counsel of Record

Karen Parenti Gunnison
WIX, WENGER & WEIDNER
P.O. Box 845
508 North Second Street
Harrisburg, PA 17108-0845
(717) 234-4182
Attorneys for Amici Curiae

THE LEGAL INTELLIGENCER, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

1. The Applicant, Pennsylvania State Association of Township Supervisors ("PSATS"), is an unincorporated association authorized under the laws of Pennsylvania to foster and represent the interests of township supervisors and townships of the second class in Pennsylvania. There are 1,458 townships of the second class in Pennsylvania, of which more than 1,450, including the township served by Petitioners, are members of the Pennsylvania State Association of Township Supervisors.

2. The disposition of the instant case will have a substantial and direct impact upon the conduct of government by the townships represented by PSATS. Although involved here is the surcharge of individual township supervisors for money expended in connection with lobbying, the overriding effect and impact of the lower court's decision is to oppress the free speech of the township government for which the individuals were speaking. Accordingly, whether or not townships and municipalities throughout Pennsylvania will be free in the future to lobby or to participate in other aspects of free speech, hinges upon a decision by This Honorable Court to review and rule upon the First Amendment issues contained in this case. Therefore, the Association, on behalf of the townships it represents and all similarly situated municipal governments, asserts a valid interest in the instant case.

3. The Applicant, National Association of Towns and Townships ("NATaT"), is an unincorporated association having offices at 1522 K Street, NW, Suite 730, Washington D.C. NATaT represents the interests of member towns, townships, villages and boroughs at the national level, and its membership consists of state organizations, such as PSATS. NATaT asserts essentially the same basis of interest as the Association, except its interest is much broader. If the instant case passes unreviewed by this Court, there is great potential for

other states, like Pennsylvania, to silence the speech of their municipalities.

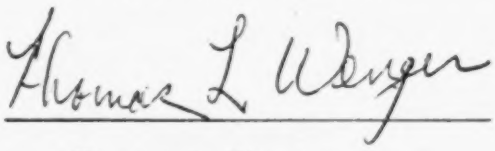
4. The question presented in the instant case, simply stated, involves the relationship of the First Amendment to municipal speech. Although the briefs of the parties in the court below have addressed this relationship, their discussions are incomplete in that they did not adequately address the lower court's failure to apply the correct test to determine whether a restriction of First Amendment rights is warranted; they inadequately discussed the subissue of whether a constitutional right can be denied by inference as opposed to explicit legislative mandate; they fail to emphasize the significance of this case as a case of first impression before the Supreme Court of the United States; and they fail to adequately describe the full impact of the decision of the Commonwealth Court of Pennsylvania, which impact can be most readily understood through towns and townships themselves, speaking through PSATS and NATaT in the within brief. Further, Applicants have no reason to believe that these arguments on these points will be expanded and made complete in this Court. If Applicants' arguments are approved by this Court, the decision of the court below must be reversed.

5. The consent of Petitioners, Silver and Parker, to filing of the enclosed Brief by Amici was obtained. The consent of Respondents, Benson, et al., was declined.

CONCLUSION

For the above stated reasons, we respectfully request leave of this Court to file the attached brief, amici curiae.

Respectfully submitted,



Thomas L. Wenger
Counsel of Record

Karen Parenti Gunnison
Wix, Wenger & Weidner
P.O. Box 845
508 North Second Street
Harrisburg, PA 17108-0845
(717) 234-4182
Attorneys for Amici Curiae

No. 83-1166

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

PAUL SILVER
and
DONALD W. PARKER,
Petitioners

v.

JOHN C. BENSON, JR., et al.,
Respondents

On Petition for Writ of Certiorari to the Commonwealth Court of Pennsylvania.

BRIEF OF PENNSYLVANIA STATE ASSOCIATION OF TOWNSHIP SUPERVISORS AND NATIONAL ASSOCIATION OF TOWNS AND TOWNSHIPS AS AMICI CURIAE

Thomas L. Wenger
Counsel of Record

Karen Parenti Gunnison
WIX, WENGER & WEIDNER
P.O. Box 845
508 North Second Street
Harrisburg, PA 17108-0845
(717) 234-4182
Attorneys for Amici Curiae

QUESTION PRESENTED

Whether communications, in the form of lobbying, by a municipal government to a state legislature concerning proposed legislation that directly affects the government and citizens of the municipality are a form of speech worthy of protection under the First Amendment to the Constitution of the United States in the absence of a statutory authorization for such form of speech.

TABLE OF CONTENTS

Page

Motion of Pennsylvania State Association of Township Supervisors and National Association of Towns and Townships for Leave to File Brief Amici Curiae 1

Brief of Pennsylvania State Association of Township Supervisors and National Association of Towns and Townships as Amici Curiae

Question Presented i

Table of Contents ii

Table of Authorities iii

Interests of Amici Curiae 1

Summary of Argument 1

Argument of Amici Curiae 2

I. The Case at Bar Presents a Substantial Federal Question 2

A. The lower court denied a municipal government the right to free expression in a manner contrary to the principles and standards enunciated by this Court in *Boston v. Bellotti* 2

B. The lower court applied a wrong test to determine this case 7

C. The instant case is one of first impression . 9

D. The disposition of this case will have a substantial impact and application far beyond its effect upon the parties to the action .. 10

Conclusion 13

TABLE OF AUTHORITIES

Cases: Page

Anderson v. City of Boston, 376 Mass. 178, 380 N.E.2d 628 (1978) *appeal dismissed*, 439 U.S. 1060 (1979) 3, 6, 10

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 3, 9, 11

Hunter v. Pittsburgh, 207 U.S. 161 (1907) 9

Mills v. Alabama, 384 U.S. 214 (1966) 4

Constitutional Provisions:

U.S. Cons. Amend. I 2

U.S. Cons. Amend. XIV, §1 8

Statutory Provisions:

Mass. Gen. Laws Ann., Ch. 55 §8 (West Supp. 1977) 3

INTERESTS OF AMICI CURIAE

The interests of *Amici Curiae* are set out in the Motion for Leave to File, *supra* paras. 1-3.

SUMMARY OF ARGUMENT

The issue before the Court presents a federal constitutional issue of substantial importance. This Court has identified the form of speech here involved, i.e., a discussion of governmental affairs, as a type of speech worthy of protection. The lower court decision from which this appeal is taken would effectively prohibit or impair such a discussion.

The eligibility of a form of speech for protection under the First Amendment depends primarily on the content of the speech and its potential value to the hearer and society, not the source of the speech or the nature of the speaker. A strong and compelling countervailing interest must be shown to deprive the speech involved of the constitutional protection to which it would be otherwise entitled. The above principles have been clearly enunciated by this Court and are of controlling importance in the proper determination of the instant case, but were not applied by the lower court. Rather, the lower court applied an improper standard which, if left unreviewed, contains capacity for great harm to the principles of free speech and the conduct of municipal government.

The review sought here is also supported by the fact that the precise issue presented has not been previously addressed by this Court.

ARGUMENT

I. THE CASE AT BAR PRESENTS A SUBSTANTIAL FEDERAL QUESTION.

A. *The lower court denied a municipal government the right to free expression in a manner contrary to the principles and standards enunciated by this Court in First National Bank of Boston v. Bellotti.*

The instant appeal is from a lower court's holding that a municipal government lacked the power to communicate (i.e., lobby) its interest in certain legislation to the state legislature. The apparent sole basis for the decision was that the applicable statute did not expressly or by clear implication authorize communication by the municipal government to the state government. Any restraint upon the free exchange of ideas in our society instantly raises the issue of whether freedom of speech, so jealously protected under the First Amendment to the constitution of the United States, U.S. Cons., Amend. I, has been abridged. Facially, therefore, the case presents a clear and important federal constitutional question.

Not every case containing a constitutional issue presents an issue of sufficient gravity and importance to warrant consideration and disposition by this Court. A second level of inquiry therefore is required to assess the significance of the constitutional issue. This second level of inquiry encountered concerns whether there is any element in the nature of the speech, the speaker, or the circumstances that surround the controversy, that affects the constitutional right asserted in such a way as to reduce or negate the importance of the federal question involved. Thus, is the speech involved worthy of First Amendment protection? If so, is there present in the case a countervailing element or principle that outweighs the protection to which the speech would otherwise be entitled?

This Court has not dealt conclusively with the specific issue presented by Petitioners, but it has approached this subject matter on two occasions. In the first, *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), this Court accepted the appeal, and in its decision, clearly confirmed the great importance attached to the preservation of a free discussion of the affairs of government. Further, the court laid down standards by which the interests of free speech in governmental affairs and the interests of restraint may be weighed against each other. In the second case, *Anderson v. City of Boston*, 376 Mass. 178, 380 N.E.2d 628 (1978), *appeal dismissed*, 439 U.S. 1060 (1979), this Court refused to hear an appeal for want of a substantial federal question. But the distinctions between *Anderson* and the instant case strike such a sharp contrast as to illuminate the importance of Petitoners' appeal and the constitutional issue involved. Both cases bear closer examination.

In *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), a Massachusetts statute forbade corporations involved in certain types of businesses "from making contributions or expenditures 'for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation.'" *Bellotti*, 435 U.S. 765, 768, (*quoting* MASS. GEN. LAWS ANN., Ch. 55 §8 (West Supp. 1977)). This Court struck down the statute as an unconstitutional abridgment of the right of free speech.

Bellotti is obviously distinguishable from the instant case in that it involved a business corporation entity as the speaker, the public as the hearer, a referendum as the object of the speech and an express statutory prohibition as the purported bar to the speech. The counterpart elements here are a municipal governmental entity, the state legislature, a proposed legislative act and statutory silence as to the right to speak. But these distinc-

tions do not detract from the applicability of the Court's analysis to the instant case. Much of the Court's opinion in *Bellotti* resonates strongly in the case at bar and throws grave doubt upon the action of the lower court. Further, the opinion clearly confirms the importance attached to the preservation of free communication concerning governmental affairs.

> '[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.' If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech.

Bellotti, 435 U.S. 765, 776-777 (1978) (*quoting Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

Just so. In the instant case, there could be no serious suggestion that the form of speech be restrained if made by an individual rather than a governmental entity.

The majority opinion defined the context in which First Amendment issues of this nature are to be weighed. Justice Powell speaking for the majority said:

> The proper question therefore is not whether corporations "have" First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether §8 abridges expression that the First Amendment was meant to protect. We hold that it does.

Belotti, 435 U.S. 765, 776 (1978).

Thus, it is the content of the speech, not the nature of the speaker, that determines whether First Amendment protection is afforded. Further, at page 777, the Court said: "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."

Bellotti, 435 U.S. 765, 777 (1978).

It is submitted as clear beyond question that the type of speech involved in the instant case is, in fact, a form of discussion of governmental affairs, the protection of which is a major purpose of the First Amendment. The prohibition of such a discussion is an action of such restrictive and chilling effect as to present a clear federal constitutional issue that demands the scrutiny of this Court.

Satisfied that the speech involved warranted First Amendment protection, the *Bellotti* court asked whether there was any element in the nature of the speaker that effectively deprived it of its entitlement to the protection of the First Amendment. In the course of that inquiry, the Court made the following observations that are readily transported to the instant controversy. The Court discarded the idea that creatures of the state have only the powers granted to them by the state as being extreme and irreconcilable with a wealth of decisional law. "[T]he States are [not] free to define the rights of their creatures without constitutional limit."

Bellotti, 435 U.S. 765, 779 n. 14 (1978).

And again, at page 780, the Court said: "[T]he States do not have greater latitude than Congress to abridge freedom of speech."

Bellotti, 435 U.S. 765, 780 n. 16 (1978).

At pages 784 and 785, the Court said: "In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue."

Bellotti, 435 U.S. 765, 784-785 (1978).

A further test set forth in *Bellotti* for determining whether a state-imposed restriction on free speech can be upheld was stated as follows:

> [W]here, as here, a prohibition is directed at speech itself, and the speech is intimately related to the process of governing, 'the State may prevail only upon showing a subordinating interest which is compelling, ...'

Bellotti, 435 U.S. 765, 786 (1978) (*citations omitted*).

In the instant case, the lower court did not find, or even seek, any counterbalancing interest that justified the court's denial of free speech by the municipal government. In fact, the lower court made no inquiry into either of the standards described above.

The second case bearing relevance to the instant one to have come before the United States Supreme Court is *Anderson v. City of Boston*, 376 Mass. 178, 380 N.E.2d 628 (1978), *appeal dismissed*, 439 U.S. 1060 (1979). There, a statute was challenged that barred a municipal government from expending public funds to speak as a partisan advocate in a general election. The lower court upheld the statute, and this Court refused the appeal of the city because it found no substantial federal question. The *Anderson* case is clearly distinguished from the present case.

First, the lower court in *Anderson* scrupulously applied the tests enunciated by this Court in *Bellotti*. The lower court in the case at bar applied no similar tests.

Second, the *Anderson* lower court acknowledged the existence of the municipality's First Amendment rights as valid and controlling unless counterbalanced by a compelling state interest. The lower court here held implicitly that such rights do not exist.

Third, in *Bellotti*, there existed a counterbalancing interest in the form of an express statutory restraint and a clearly perceptible underlying basis for the restraint. In the instant case, neither of these factors is present.

Fourth, the form and content of the speech in *Bellotti* were of a sort that was susceptible to being counterbalanced and outweighed. That is, it involved

the partisan participation of a governmental body in a general election; an activity that might well cast doubt upon the fairness of the election. In contrast, the instant case involves a form of speech that was identified by this Court in *Bellotti* as being worthy of constitutional protection, i.e., a discussion of governmental affairs. The lower court in *Anderson*, even while upholding a statutory restraint upon free speech by a municipal government, recognized a clear distinction between the issue before it and communication by a municipal government concerning legislation.

> We are not concerned here with the First Amendment or other right of a municipality to expend public funds to influence legislative action. Municipal action concerning legislation has statutory, traditional, and constitutional foundations which are not applicable to municipal action on questions submitted to the people.

Anderson, 380 N.E.2d 628, 635 n. 11 (1978).

We respectfully submit that this Court's action in *Anderson* is not a basis for rejecting Petitioners' plea in the instant case. On the contrary, the patent distinctions between Petitioners' case and the decision in *Anderson* serve to underline the need for disposition by Your Honorable Court of the specific issue here presented. We further submit that the *Bellotti* and *Anderson* decisions clearly show the constitutional importance of the issue here involved and the need for specific consideration and decision by this Court.

B. *The lower court applied a wrong test to determine this case.*

It is clear beyond doubt that the action of the Court below constituted a restraint upon free speech. Whether or not the restraint is ultimately deemed constitutionally valid, it is imperative that the issue be determined in ac-

cordance with the tests and standards that this Court has established and described. To permit divergence from those standards is to lose more than mere predictability. In the instant case, for example, the lower court, without paying so much as a nod of recognition to the guidelines set forth by this Court in *Bellotti*, would deprive not only the township government, but also the citizens of the township, the state legislature and the society at large of the fruits that might result from a free flow of ideas from the township to the state legislature concerning governmental affairs, specifically litigation in which the township is legitimately interested.

We assert that the lower court applied a wrong test in determining the instant case on the basis of a statutory silence. It merely asked, "Does the statute authorize this kind of speech?" In the absence of express or clearly implied statutory authorization, it held that no right to speak to the state legislature existed in the municipal government. The lower court did not inquire into the worthiness or content of the speech or the importance of the form of speech as a source of information to the state legislature; nor did its decision depend upon an over-riding legislative prohibition; nor did it find a counterbalancing interest or right that justified the restraint imposed. Rather, the sole basis for the lower court's decision appears to be the premise that legislatively-created entities such as townships have no constitutionally-protected rights, except to the degree that such rights are accorded to them by the creating legislature. The premise itself is internally flawed since the states lack power to withhold rights guaranteed by the federal constitution. U.S. Cons. Amend. XIV, §1. Further, it seems highly improbable that the legislature intended to insulate itself from input and communications from local governments throughout the state.

More important for purposes of the present discussion, however, is the fact that the lower court's basis for analyzing and determining the case differs wholly from

the standards and tests established by this Court. We urge this Honorable Court to recognize that to permit the continued existence and perpetuation of the lower court's test in this case would be a serious abridgment of the standards set forth in *Bellotti*, and a host of other decisions of this Court, and would inevitably lead to wider incursions upon the constitutional rights of entities whose origin and nature are dependent upon legislative act.

C. The instant case is one of first impression.

The precise issue presented here is whether lobbying efforts by a municipal government to a state government constitute a form of speech protected by the federal Constitution. The lower court held they are not protected, even though there exists no statutory prohibition against such communications, and even though no counterbalancing interest has been shown to warrant the prohibition.

The case of *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), discussed at length above, extensively addresses principles and considerations that bear directly upon the instant case. But there are critical distinctions which leave the *Bellotti* answers short of the question here presented. Primary among these is the fact that *Bellotti* involved a creature of statute, but a private business corporation, rather than a governmental entity that is admittedly an agency of the sovereign state government. Contained within the instant case, therefore, is the issue of whether such an agency of the state, once created, has an identity separate from that of the state government. It is commonly recognized that such municipal governments are subject to complete control of the state, including the power to create, alter and destroy. *Hunter v. Pittsburgh*, 207 U.S. 161, 178-179 (1907). It is not clear, however, that such an agency, during the term of its existence, has no separate identity

and is entitled to no constitutional protections other than the ones expressly accorded to it by the creating legislature.

Similarly, this Court's disposition of *Anderson v. City of Boston*, 376 Mass. 178, 380 N.E.2d 628 (1978), *appeal dismissed*, 439 U.S. 1060 (1979), fails to supply an answer to the instant controversy. The distinguishing factors in *Anderson* were that it involved a specific statutory prohibition against the form of speech involved and the entitlement to First Amendment protection was opposed by a strong counterbalancing interest in that the form of speech entailed partisan participation by a governmental entity in a general election. The lower court in *Anderson* recognized the absence of authority in this general area of the law. *Anderson v. City of Boston*, 376 Mass. 178, _____, 380 N.E.2d 628, 635 (1978). The many points of divergence between this appeal and *Anderson* negatives any claim that *Anderson* is controlling precedent in the instant case.

We respectfully submit that, in the absence of prior authority, and in view of the importance of the issue involved, the instant appeal warrants the consideration and decision of this Court.

D. The disposition of this case will have a substantial impact and application far beyond its effect upon the parties to the action.

There are in Pennsylvania 1,458 townships of the second class. These are municipal governments exactly like the one represented by Petitioners. Additionally, there are more than 1,000 other municipal governments in Pennsylvania, consisting of townships of the first class, boroughs, cities and an incorporated town. Each of these is subject to a statute that is identical or substantially similar in relevant part to the one that governs the Petitioners' township. The outcome of the instant case, therefore, will affect directly and substantially the conduct of government in each of these municipalities.

The potential effect of the decision in this case, of course, is multiplied if extended to the municipal governments of Pennsylvania's sister states.

Nor is the impact of the case likely to be limited to communications to the state legislature. The conduct of municipal government involves frequent transactions and communications between the municipal government and various departments and agencies of the state. Few of these necessary transactions are sanctified by express statutory authorization. The rule of the lower court in the instant case, therefore, would silence speech by municipal governments, not only to their state legislature, but also to every state department or agency with respect to which there is no statutorily authorized power of communication.

The chilling and restrictive effect of the lower court's rationale may not be limited to communications to state government, but by logical extension, may apply to any form of speech contemplated by officials of a municipal government. It is important to note that under the decision of the lower court, the fact that communication served a legitimate and substantial township interest provided no protection to the officials and no authority for the form of speech. Rather, the court simply looked to the governing statute and held that if the power to speak is not clearly given in the statute, then the power to speak does not exist.

We believe the rule of the lower court here is monumentally oppressive. Its necessary effect, if left intact, is to absolutely prevent the flow and exchange of ideas from municipal government to the state legislature and to chill and impede virtually every form of communication emanating from municipal governments. Such a result seems strikingly contrary to the rule described in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), where this Court said that the flow of free speech concerning affairs of government is one of the

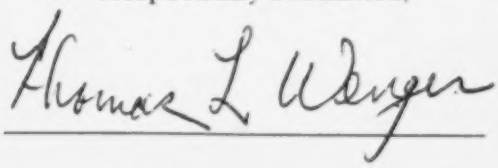
forms of speech most deserving of protection and preservation by the First Amendment to the Constitution.

The immense impact of this case, not only in terms of its holding, but also in terms of the rationale employed by the lower court to reach the holding, supports the need for consideration and disposition of the issues involved by this Court.

CONCLUSION

According to this Court in *First National Bank of Boston v. Bellotti*, First Amendment protection depends upon the type of speech, not its source. State restriction of protected speech is only supportable if based on compelling state interests. By failing to recognize these well-founded premises, and by finding a prohibition against full discussion of governmental affairs in a statutory silence, the lower court has presented this Supreme Court with a significant case of first impression. States are currently without guidance as to the relationship of the First Amendment to municipal entities. The decision of the lower court will fill that void by effectively silencing local governments, unless this Court chooses to review the issue at hand. Accordingly, the *Amici Curiae* respectfully request that this Honorable Court grant Petitioners' request for Writ of Certiorari to the Commonwealth Court of Pennsylvnia.

Respectfully submitted,



Thomas L. Wenger
Counsel of Record

Karen Parenti Gunnison
WIX, WENGER & WEIDNER
P.O. Box 845
508 North Second Street
Harrisburg, PA 17108-0845
(717) 234-4182
Attorneys for Amici Curiae

MOTION FILED
FEB 15 1984

No. 83-1166

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

PAUL SILVER and DONALD W. PARKER,
Petitioners,
v.
JOHN C. BENSON, JR., *et al.*,
Respondents.

On Writ of Certiorari to the Commonwealth Court of Pennsylvania

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF THE UNITED STATES CONFERENCE OF MAYORS, THE NATIONAL ASSOCIATION OF COUNTIES AND THE NATIONAL LEAGUE OF CITIES IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

STEPHEN CHAPPLE *
General Counsel
JOHN J. GUNTHER
Executive Director
United States Conference of Mayors
1620 Eye Street, N.W.
Washington, D.C. 20006
(202) 293-7330
Counsel for Amici Curiae
United States Conference of Mayors
National Association of Counties
National League of Cities

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1166

PAUL SILVER and DONALD W. PARKER,
Petitioners,

v.

JOHN C. BENSON, JR., *et al.*,
Respondents.

On Writ of Certiorari to the Commonwealth Court of Pennsylvania

---

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Pursuant to Rule 36 of the Rules of the Supreme Court of the United States, the U.S. Conference of Mayors, the National Association of Counties and the National League of Cities hereby move for leave to file a brief *Amici Curiae* in the above-captioned proceedings, and in support thereof state:

1. The decision of the Commonwealth Court of Pennsylvania, in imposing an audit surcharge of $35,743.23 on Petitioners who, as elected officials and in clear furtherance of the interest of the township they represent,

petitioned the State legislature for a statutory change affecting the township, will have a deleterious and chilling effect on local elected officials throughout the United States.

2. The decision will have far reaching consequences for the cities and counties of America which need to have their interests represented in State and Federal legislative councils and which can only be represented by elected and appointed officials of such cities and counties acting in the due course of their public duty.

3. The decision in this case will undermine the responsiveness of elected officials of local governments to the needs of their constituents, at least to the extent that those needs should be presented to State and Federal government officials.

4. If some (or all) First Amendment protections are unavailable to municipal corporations themselves, cities and counties will be put at a substantial disadvantage in their representation of the collective interests of their citizens in the "public marketplace of ideas."

5. This case presents important issues of law of direct and immediate concern to the members of *Amici*, the nation's counties and cities.

6. Accordingly, *Amici* seek this opportunity to make known their views to the Court and to attempt to assist the Court in its decision on the Petition for Certiorari.

7. Counsel for *Amici* has sought, but was unable to secure, consent to file the attached brief *Amici Curiae* from Respondent.

Counsel for *Amici* hereby requests that the Court grant this Motion to File the brief *Amici Curiae* of the United States Conference of Mayors, the National Association of Counties and the National League of Cities and

that the attached brief be accepted as part of the record in this case.

Respectfully submitted,

STEPHEN CHAPPLE *
General Counsel

JOHN J. GUNTHER
Executive Director
United States Conference of Mayors
1620 Eye Street, N.W.
Washington, D.C. 20006
(202) 293-7330

Counsel for Amici Curiae
United States Conference of Mayors
National Association of Counties
National League of Cities

* Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
THE IDENTITY AND INTEREST OF THE AMICI CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. FIRST AMENDMENT RIGHTS ARE SO FUNDAMENTAL TO THE CONDUCT OF THE PUBLIC'S BUSINESS THAT THE IMPAIRMENT OF THOSE RIGHTS OF ANY PARTICIPANT IN SOCIETY, INCLUDING MUNICIPAL CORPORATIONS, WILL SERIOUSLY ERODE THE FREE DISCUSSION OF GOVERNMENTAL AFFAIRS	5
II. AS GUARDIANS OF FIRST AMENDMENT RIGHTS, AND AS PARTIES THAT ARE HELD RESPONSIBLE FOR DEPRIVATIONS OF THOSE RIGHTS, MUNICIPALITIES ARE SUBJECT TO A FANTISTIC WEB OF LEGAL OBLIGATIONS AND DUTIES TO THE CITIZENRY; MUNICIPALITIES NEED TO BE ABLE TO CLAIM SOME CORRELATIVE PROTECTION FOR THEIR ACTIVITIES UNDER THE FIRST AMENDMENT	12
CONCLUSION	15

TABLE OF AUTHORITIES

CASES Page

Bradley v. Saxbe, 388 F.Supp. 53 (D.D.C., 1978) .. 13
City of Boston v. Anderson, 439 U.S. 951, 439 U.S. 1389, *appeal dismissed*, 439 U.S. 1060 (1978) 3
City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978) 10
City of Long Beach v. Bozek, 31 Cal.3rd 527, 183 Cal.Rptr. 86, 645 P.2d 137 (1982), *vacated and remanded*, January 10, 1983, 51 U.S.L.W. 3507 .. 13
City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Commission, 429 U.S. 167 (1976) 9
Community Communications Corporation v. City of Boulder, 455 U.S. 40 (1982) 13, 14
Connick v. Myers, —— U.S. ——, 75 L.Ed.2d 708 (1983) 7, 8
Cox Broadcasting v. Cohn, 420 U.S. 469 (1975) 11
Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 14
First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 6, 9, 10, 11
Freedman v. Maryland, 380 U.S. 51 (1965) 9
Mills v. Alabama, 384 U.S. 214 (1966) 6
Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978) 10
National League of Cities v. Usery, 426 U.S. 833 (1976) 10
Parker v. Brown, 317 U.S. 341 (1943) 14
Perry v. Sindermann, 408 U.S. 593 (1972) 8
Southeastern Promotions v. Conrad, 420 U.S. 546 (1975) 9
Stromberg v. California, 283 U.S. 359 (1931) 6
United Mine Workers v. Pennington, 381 U.S. 657 (1965) 14
United States v. Harriss, 347 U.S. 612 (1954) 13

STATUTES

Federal Regulation of Lobbying Act, 2 U.S.C. §§ 261 *et seq.* 12

Page

Commonwealth of Pennsylvania Lobbying Registration Act, 46 Pa. Stat. Ann. § 148.2 (Supp. 1983-1984) 12

OTHER SOURCES

Frug, "The City As A Legal Concept," 93 *Harv. L.Rev.* 1057 (1980) 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1166

PAUL SILVER and DONALD W. PARKER,
Petitioners,

v.

JOHN C. BENSON, JR., *et al.*,
Respondents.

On Writ of Certiorari to the Commonwealth Court of Pennsylvania

---

BRIEF AMICI CURIAE OF THE UNITED STATES CONFERENCE OF MAYORS, THE NATIONAL ASSOCIATION OF COUNTIES AND THE NATIONAL LEAGUE OF CITIES IN SUPPORT OF PETITIONERS

IDENTITY AND INTEREST OF THE AMICI CURIAE

Amici, the United States Conference of Mayors, the National Association of Counties and the National League of Cities are the national membership organizations of the nation's cities and counties. The Conference was organized during the Great Depression to promote the causes of the cities and to foster responsible, informed and effective relationships between city halls and the

Federal Government. By limiting its membership to cities of over 30,000 in population, the Conference represents the needs of larger cities. Of the 800 cities eligible for membership in the Confernce, over 480 are full members, including virtually all cities of over 100,000 in population.

The National Association of Counties is the only national organization representing county government in the United States. Its membership spans the spectrum of urban, suburban and rural counties which have joined together for the common purpose of strengthening county government. NACo member county governments cover over 85% of the U.S. population.

The National League of Cities (NLC) was founded in 1924 by reform minded State Municipal Leagues and constitutes a national organization representing municipal interests before Congress and the Administration. Its membership includes direct member cities, state municipal leagues and state league member cities. In all, almost 15,000 cities and municipalities, both large and small, are members of and participate in the activities of NLC. NLC is particularly concerned over the impact of the decision below on very small municipalities, many of which are represented by part-time, "citizen" legislators.

In addition to their concern over the substantial effect the decision below will have on Petitioner elected officials and on the township, *Amici* are troubled that local governments in all parts of the United States will find themselves subject to novel questions regarding their rights to participate, through their elected officials in political processes affecting their everyday existence. Of equal importance, elected officials of those government entities, cognizant of the grievous consequences that have fallen on the Petitioners for their good faith, "laudable," activities on behalf of their constituents, almost certainly will be deterred from the vigorous exercise of their pub-

lic obligations for fear of facing similar, Draconian results.

The decision below, in combination with the reservation of the question of the First Amendment rights of municipalities in *City of Boston v. Anderson*, 439 U.S. 951, 439 U.S. 1389, *dismissed for want of a substantial Federal question*, 439 U.S. 1060 (1978), can only fuel the uncertainty of municipal officials in their efforts to implement public policy. Fear of personal liability for activities such as those found in this case (undertaken with advice of counsel and in furtherance of a clear and relevant public purpose) will serve to discourage conscientious citizens from seeking public office where the financial rewards are so often so meager and the potential for personal liability is so great.

This Court's plenary review of the decision below would clarify for cities and counties and their elected officials the permissible ambits of their First Amendment activities. Mayors, and city and county officials need the guidance of this Court. Accordingly, *Amici*, the U.S. Conference of Mayors, the National Association of Counties and the National League of Cities urge that the Court grant the Petition for Certiorari in this case.

SUMMARY OF ARGUMENT

The Commonwealth of Pennsylvania has surcharged Petitioner elected township officials for all expenses incurred by the township in moving an amendment concerning the zoning powers of the township through the State legislature. The trial court found that the Petitioners acted in good faith. The Commonwealth Court characterized the type of activity engaged in by Petitioners as "laudable." The case raises disturbing First Amendment questions as to the rights of both elected officials to represent the collective interests of their constituents, and of municipal corporations, themselves, to

be heard in legislative deliberations concerning their authority.

1. Unless municipal corporations, themselves, have First Amendment rights to petition the State legislature and to exercise Freedom of Speech, it is likely that their voices will not be heard on matters of public concern. The only real choice available to Petitioners, other than the one they chose, was to remain silent, both on their own behalf and on behalf of the township. If the Petitioners were to have used their own funds to engage in lobbying, there could be no assurance or check that they would properly be representing the interests of the municipality; in fact, such expenditures by public officials tread on the limits of conflict-of-interest. The silence of elected officials and of the municipality constitutes a loss of major proportions to the public debate of issues of direct and immediate concern to the officials in their representative capacity, and to the municipality. This case raises important questions on the dependent nature of the exercise of First Amendment rights by municipal corporations and the elected officials who are sworn to protect the interests of municipalities.

2. This case also raises novel questions of the application of other First Amendment doctrines to public officials and the cities and counties they serve. To the extent that the ability of cities and counties to petition their State legislatures is impaired by the decision below, how are such local governments going to be able faithfully to carry out the obligations imposed on them by Federal and State constitutions and laws?

ARGUMENT

I. FIRST AMENDMENT RIGHTS ARE SO FUNDAMENTAL TO THE CONDUCT OF THE PUBLIC'S BUSINESS THAT THE IMPAIRMENT OF THOSE RIGHTS OF ANY PARTICIPANT IN SOCIETY, INCLUDING MUNICIPAL CORPORATIONS, WILL SERIOUSLY ERODE THE FREE DISCUSSION OF GOVERNMENTAL AFFAIRS.

A. Petitioners in this case as elected officials of a township in rural Pennsylvania undertook a lobbying effort on behalf of the township for the passage of state legislation affecting the township's zoning procedures. The township's auditors questioned the legal basis for the expenditure of public funds by the Petitioners for these activities, but decided not to surcharge the officials. Certain township taxpayers then appealed the decision of the auditors to the Court of Common Pleas which, despite finding that the Petitioners had "acted in good faith and without fraud in spending township funds for what they thought was a proper public purpose," surcharged the Petitioners, jointly and severally in the amount of $35,743.23. (A-13)[1]

The Commonwealth Court of Pennsylvania affirmed on appeal on the ground that the expenditures were not budgeted properly. In so holding, however, the Court noted the importance of local government participation in the state legislative process and gave its view that local government lobbying "is in no sense evil or pernicious; in most cases, it is probably laudable." (A-4). Petitioners' sole compensation for holding public office is that they are reimbursed $25.00 per township meeting they attend. (P-i).

The question presented, as taken from the Petition for Certiorari, is whether municipal corporations, when

[1] References to the Petition for Writ of Certiorari and the attached Appendix will be made as (P-) and (A-), respectively.

speaking on matters concerning their governmental responsibilities, are themselves endowed with First Amendment rights comparable to those possessed by private corporations under *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (P-i).

B. There are no more cherished values found in the Federal Constitution than the freedom of speech and the right to petition government, both embodied in the First Amendment. Protection of these liberties is elementary to the proper operation of a political system based on law and reasoned discourse.

> The maintenance of the opportunity for free political discussion to the end that the government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. *Stromberg v. California*, 283 U.S. 359, 369 (1931).

It is an axiom of First Amendment law that "a major purpose of [the First] Amendment was the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). In the case at bar, Petitioners, on behalf of their township, approached the State legislature with proposals for statutory amendments directly affecting the zoning code of the township. Surely, these efforts constitute "discussion of governmental affairs."

It is indisputable that if the Petitioners had used their own funds to lobby on behalf of the township, their speech would have been protected. However, because they spoke for a municipal corporation, and expended the funds of that corporation, they are being surcharged significant sums for petitioning the legislature and engaging in political discussions. In *Bellotti*, *supra*, the Court observed that "If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech." 435 U.S. at 777. What alternatives were available to Petitioners, then, that

would permit them to engage in the protected speech and to speak out on behalf of their constituents? Each other course of action degrades First Amendment rights.

Petitioners could have chosen to remain silent on the zoning code legislation. Such silence, however, could have been questioned as a breach of their public duty to represent the concerns of the citizens on a matter of direct, immediate and important effect on the township. In addition, it is only in rare instances that silence is the most meaningful exercise of freedom of speech. It is a rare instance indeed, when silence is an effective tool in moving favorable legislation through a State house or the Congress. The ultimate effect of Petitioners' silence would be that the township's concerns would not be voiced in the public debate.

Petitioners could have chosen to expend their own funds on behalf of the township. Several problems plague this choice. First, legislative action, as demonstrated in this case, is an expensive business. Where were the Petitioners to find the resources required to wage this campaign on behalf of the township? Second, and more important, is the question of the appropriateness of asking elected officials to use personal funds to represent the electorate. Local governments should not have to hope for the election of the wealthy to public office for their concerns to be presented in public settings. It would be troubling if municipalities were dependent on the largesse of elected officials to insure their equal participation in the public debate.

And, personal payment by elected officials may serve to deter citizen participation in local government. The burdens may simply be too great. Just last term this Court stated that one of its responsibilities "is to ensure that citizens are not deprived of fundamental rights by virtue of working for government. . . ." *Connick v. Myers*, —— U.S. ——, 75 L.Ed.2d 708, 720 (1983). In fact, to the extent that elected officials have an obligation faithfully

to execute the duties of their public office, any requirement that they do so out of personal funds raises the spectre of forcing them to "relinquish their First Amendment rights as a condition of public employment." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), and *Connick, supra*, at 726. (Brennan, J., dissenting.)

One final difficulty with the use of personal funds to represent municipal corporate concerns is that questions will arise over the exact nature of the interest being represented. It is doubtful that it is in the best interest of governmental entities to permit officials, cloaked with the apparent authority of elected governmental office, to spend unreported, untraceable and, possibly, unlimited amounts of private funds in seeking legislation arguably of value to the entity. At least the expenditure of public funds requires that the funds be accounted for in a public forum, subject to public scrutiny. As the facts of this case amply demonstrate, the citizens of Buckingham Township were well aware of the expenditure of public funds for lobbying, from the public meeting held to discuss the legislative effort (P-15, n.13), to the bringing of this case. Once the citizens and taxpayers became aware of this expenditure, the question became a political one, and the proper resolution of the dispute should have been at the ballot box, not by the use of the surcharge.

The other choice arguably available to Petitioners was that they could have complied with the law of Pennsylvania by budgeting the funds as suggested by the Commonwealth Court (A-5). However, as demonstrated by Petitioners, (P-14, n.13), it was impossible under State law for the township budget to be amended during the pendency of the legislation; in fact, the legislation supported by the township was adopted within a single budget year. Under this alternative the Petitioners would have had to have remained silent in the legislative deliberations while they waited for the budget year to catch up with them. Any State procedure which puts

such constraints on the exercise of First Amendment rights should be subject to strict scrutiny. *Freedman v. Maryland*, 380 U.S. 51 (1965), *Southeastern Promotions v. Conrad*, 420 U.S. 546 (1975). In addition, even if the Petitioners had been able to comply with the budget mandates of the State, it appears that the Commonwealth Court was not convinced that the township had "express or implied" authorization under Pennsylvania law to engage in lobbying activities. See, discussion at P-15, n.14, and A-5.

One last note on the choices available to the Petitioners: The Respondents, all other citizens of the township, as well as land developers and private corporations, (see, *First National Bank of Boston v. Bellotti, supra*) had every right to be at the State legislature, using whatever funds they deemed advisable, seeking whatever changes to the State zoning code they deemed desirable. The decision of the court below, assures that one participant, the township whose powers are the subject of the legislation, will not have equal access to the public deliberations of the legislature. "To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees." *City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167, 176-177 (1976).

Given the choices before them, Petitioners appear to have taken the best and most expeditious path available: they used township funds to petition the State legislature on an issue of immediate concern to the township and the citizens they had sworn to serve.

C. Cities and other local governments occupy a unique place in the American system of government. "[I]n working out a legal status for cities, courts have for centuries wrestled with the question, which has perplexed liberal theorists, whether to classify cities as an exercise

of freedom by individuals or as a threat to freedom analogous to that posed by the state." Frug, "The City As A Legal Concept," 93 *Harv. L. Rev.* 1057, 1077 (1980).[2] In fact, local governments are interspersed between the State and individuals, possessing characteristics of both. "Cities are not themselves sovereign; they do not receive all the federal deference of the States that created them." *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 412 (1978), cf., *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), *National League of Cities v. Usery*, 426 U.S. 833 (1976).

However, even as "creatures of the State" cities and other local governments should have available to them the First Amendment rights available to private business corporations. As this Court noted in *Bellotti*,

> The Massachusetts court did not go so far as to accept appellee's argument that corporations, as creatures of the State, have only those rights granted them by the State. The court below recognized that such an extreme position could not be reconciled either with the many decisions holding state laws invalid under the Fourteenth Amendment when they infringe protected speech by corporate bodies. . . .
>
> In cases where corporate speech has been denied the shelter of the First Amendment, there is no suggestion that the reason was because a corporation rather than an individual association was involved. . . . [T]he States are [not] free to define the rights of their creatures without constitutional limit.

---

[2] In this seminal article on the legal history and development of American cities, Professor Frug discusses the "series of complex dualities" that characterize our thinking about cities: sometimes they represent individuals, sometimes the State, sometimes their activities are "governmental," sometimes "proprietary," at 1075. This section will discuss the individual rights of local governments as they represent collections of individuals in contrast to their rights as corporations.

435 U.S. at 779, n.14. (Citations and references, omitted).

Municipal corporations, like private corporations, can only speak through their elected or appointed officials. Municipal officials regularly face elections, in effect, performance evaluations by the citizens, for, "the citizenry is the final judge of the conduct of public business," *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495 (1975). Because of the frequency and openness of public elections, local government officials have to be responsive to the needs and wishes of the electorate. They, therefore, may be at least as attentive to the needs of the citizenry as are corporate officials of the specific needs of shareholders. In *Bellotti, supra*, the Court relied on the fact that "the procedures of corporate democracy" were sufficient to protect the interests of shareholders in decisions by management to "engage in debate on public issues." 435 U.S. 794. Unlike the corporations in *Bellotti*, Petitioners in this case were not attempting to influence the outcome of a referendum, but, rather, were pursuing State legislation, an activity that Massachusetts did not attempt to abridge. *Bellotti, supra*, 435 U.S. at 791, n.31.

The actions of Petitioners in voicing the concerns of the township and its citizens before the State legislature on a matter of direct impact on the township should be entitled to the same First Amendment protections available to individuals and private corporations alike.

II. AS GUARDIANS OF FIRST AMENDMENT RIGHTS, AND AS PARTIES THAT ARE HELD RESPONSIBLE FOR DEPRIVATIONS OF THOSE RIGHTS, MUNICIPALITIES ARE SUBJECT TO A FANTASTIC WEB OF LEGAL OBLIGATIONS AND DUTIES TO THE CITIZENRY; MUNICIPALITIES NEED TO BE ABLE TO CLAIM SOME CORRELATIVE PROTECTION FOR THEIR ACTIVITIES UNDER THE FIRST AMENDMENT.

The discussion below will raise only a few of the questions that local government entities must face that implicate First Amendment protections. Plenary review of this case by the Court would be of enormous benefit to local government officials in their efforts to discern their responsibilities and obligations under various First Amendment settings.

A. The Pennsylvania legislature has determined that elected and appointed officials of local governments are not to be considered "lobbyists."[3] The Congress of the United States has also exempted public officials from the Federal Regulation of Lobbying Act, 2 U.S.C. § 261 *et seq.*, § 267(a). In upholding the constitutionality of the

---

[3] "Lobbyist" means any natural person who:

(i) Is employed or engaged for compensation, by any other person or any partnership, committee, association, corporation or any other organization to lobby.

(ii) Makes expenditures or incurs obligations on behalf of any one person he represents in excess of three hundred dollars ($300) in any one calendar month except that a natural person shall not be considered a lobbyist when he:

(A) Formally communicates with or formally presents testimony before an agency of the Commonwealth or the General Assembly.

(B) Testifies before a committee of the General Assembly.

(C) Is an officer, official or employee of the Commonwealth of Pennsylvania or any political subdivision thereof and is acting in his official capacity. 46 Pa. Stat. Ann. § 148.2 (Supp. 1983-1984)

Federal Act, this Court found that it was proper for Congress to force disclosure by private "special interest groups seeking favored treatment while masquerading as proponents of the public weal." *United States v. Harriss*, 347 U.S. 612, 625 (1954). When public officials go to Congress, or their State legislatures, to speak on matters of local concern, they are not "masquerading as proponents of the public weal," they are the elected representatives of the public weal. The involvement of local elected officials in the day-to-day work of Congress and the State legislatures is of vital importance to the maintenance of the intergovernmental system representing cooperative Federalism. See, e.g., *Bradley v. Saxbe*, 388 F.Supp. 53, 56-57 (1975). Surely, local governments, as partners in the intergovernmental system, should have the same rights of petition as all other citizens.

The California Supreme Court has recently ruled that the right to petition government includes an absolute right to pursue litigation against local governments, and that local governments cannot bring suits for malicious prosecution against citizens. *City of Long Beach v. Bozek*, 31 Cal.3rd 527, 183 Cal.Rept. 86, 645 P.2d 137 (1982), *certiorari granted, judgment vacated and remanded for consideration as to its basis on State or Federal constitutional grounds*, January 10, 1983, 51 U.S.L.W. 3507. It would be incongruous to place undue impediments upon local governments in their efforts to petition State legislatures while, concurrently, they are absolutely required to entertain, even at considerable expense, all petitions brought to them.

B. A recent decision of this Court underscores the importance of local government access to the State legislature. In *Community Communications Corporation v. City of Boulder*, 455 U.S. 40 (1982), the Court found that local governments can only claim the benefits of the "State Action" doctrine to escape scrutiny under the

Federal antitrust laws if they are operating under "clearly articulated and affirmatively expressed" state policies to displace competition. 455 U.S. at 51. And, the majority stressed the lesson from *Parker v. Brown*, 317 U.S. 341, 350 (1943), that the State legislature is the proper forum for State review. 455 U.S. at 54.

If, as under the facts of the case at bar, governmental entities are restricted in their access to State legislatures, and, for fear of personal liability, local elected officials are reticent about approaching State legislatures, local governments will be hard pressed to secure the State immunizing legislation required by *Boulder*.

Of equal importance, in defending Sherman Act suits, if local governments do not have First Amendment protections, they may not be able to claim the benefits of the *Noerr-Pennington* doctrine to support their legislative efforts. See, *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). The doctrine is premised on the First Amendment right to petition government and provides an immunity for lobbying and other joint efforts by citizens to induce anticompetitive governmental action.

C. This section suggests some of the difficult theoretical problems that arise from the premise that local government entities have limited First Amendment rights. Local governments, and their elected officials need a clarification of the nature and extent of their rights under the First Amendment.

CONCLUSION

For all the foregoing reasons, the decision of the Commonwealth Court of Pennsylvania in this case should be reviewed by this Court.

Dated: February 15, 1984

Respectfully submitted,

STEPHEN CHAPPLE *
General Counsel

JOHN J. GUNTHER
Executive Director
United States Conference of Mayors
1620 Eye Street, N.W.
Washington, D.C. 20006
(202) 293-7330

Counsel for Amici Curiae
United States Conference of Mayors
National Association of Counties
National League of Cities

* Counsel of Record

(THIS PAGE INTENTIONALLY LEFT BLANK)

Office - Supreme Court, U.S.
FILED
FEB 22 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1166

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

PAUL SILVER and DONALD W. PARKER,
Petitioners,

vs.

JOHN C. BENSON, JR., *et al.*,
Respondents.

OBJECTION OF RESPONDENT TAXPAYERS TO MOTIONS FOR LEAVE TO FILE BRIEFS *AMICI CURIAE*

Robert W. Valimont
William E. Benner
Anita F. Alberts
POWER, BOWEN & VALIMONT
102 North Main Street
Doylestown, Pennsylvania 18901
(215) 345-7500
Attorneys for Respondent Taxpayers

Cover printed by:
Batavia Times Publishing Co
Edward W. Shannon
Philadelphia, Pa. (215) 232-6181

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 83-1166

PAUL SILVER and DONALD W. PARKER
Petitioners,

vs.

JOHN C. BENSON, JR., et al
Respondents.

OBJECTION OF RESPONDENT TAXPAYERS TO MOTIONS FOR LEAVE TO FILE BRIEFS AMICI CURIAE

This objection is filed pursuant to United States Supreme Court Rule 36. This case is here on Petition of Paul Silver and Donald Parker for Writ of Certiorari to the Commonwealth Court of Pennsylvania.

Respondent taxpayers have withheld consent from the various applicant amici organizations for four reasons.

First, these organizations have no interest in the question presented by this case, i.e. whether elected officials may be required to remit misspent public funds to municipal treasuries pursuant to state law permitting surcharge for unauthorized expenditures. Applicant organizations may have an interest in the question they contend should be considered by this Court, but that issue was never presented to or considered by the courts below.

The trial court considered only the following issue, by agreement of the parties, as taken verbatim from the

trial transcript, page 53a, lines 7-17:

> THE COURT:
> Finally, I believe it was agreed that the exact language of the issue framed is as follows and the legal issue that the court will address itself to is the question whether the supervisors of a second class township have the authority to spend township funds to engage persons not already employed by the township for the express purpose of lobbying for the passage of state legislation.

The Commonwealth Court of Pennsylvania considered the same issue and affirmed, wholly on the basis of state law. There is no federal question presented by this case.

Second, applicant amici organizations are attempting to supplant Respondent taxpayers as representatives of the municipal interest in this case by asserting that they speak for various

municipalities. There is no municipal party in this case; to the extent municipal interests are represented here, Respondent taxpayers alone have proper standing to represent them in challenging public expenditures. Applicant amici organizations representing mayors, large and small cities, and counties across the nation have no valid interest in this case. They are not governed by the Second Class Township Code of Pennsylvania under which this case was decided. They make no complaint against any comparable surcharge statutes of their own states. The applicant amici organizations from Pennsylvania -- who should be challenging the surcharge provision of Pennsylvania's Second Class Township Code if they want protective legislation from the

Pennsylvania Legislature, do not do so. Instead, they attempt to obscure the issue of fiscal accountability for unbudgeted and unauthorized expenditures by burying them under a makeshift constitutional "question" nobody has raised in this case, until now.

Third, the fact that both proposed amici briefs frame their "issues" exclusively in the future tense is tacit acknowledgment that no chilling, silencing, or content regulation of protected speech has occurred in this case. Applicants decry the surcharge but do not challenge the constitutionality or propriety of the statute under which it was imposed. Some applicant amici complain that surcharge should not be imposed upon elected officials who are paid only

$25 per meeting. This complaint is properly directed to the Pennsylvania Legislature, which holds the purse strings, not to this Court. If applicant amici wish protection against future surcharge for misspending public funds, the unchallenged state surcharge statute should be the proper subject of their concern, not the claimed "question" asserting municipal corporations' First Amendment rights.

Applicants, like Petitioners, seek to cloak the real issue in this case, i.e. fiscal accountability of freespending public officials, in eloquent but invisible constitutional garb.

Fourth, applicant amici, like Petitioners, attempt to pull a federal issue

up from this case by its bootstraps -- by abandoning the issues decided below, then framing for this Court a new issue never even addressed to the state courts below, then claiming this Court needs their assistance as amici in an effort to claim federal jurisdiction on the ground Pennsylvania courts ignored the constitutional issue of vague dimensions which they raise here.

There are no novel issues in this case, except in the briefs of applicant amici and Petitioners. There has never been a claim of abridgement of municipal speech, except as phrased in language of a future chilling effect. State and federal law is consistent and has long followed the established principle that First Amendment freedoms need not be

subsidized with public funds unless the state Legislature has specifically decided it wishes to do so. Applicant amici, like Petitioners, seek an advisory opinion on a hypothetical federal constitutional issue not present in this case.

Federal jurisdiction as defined in Article III of the United States Constitution cannot be achieved in this case. Applicants should be denied permission to file briefs as amici curiae and this Court should not review this case.

Respectfully submitted,

ROBERT W. VALIMONT
WILLIAM E. BENNER
ANITA F. ALBERTS
POWER, BOWEN & VALIMONT
102 North Main Street
Doylestown, Penna. 18901
(215)345-7500
Attorneys for Respondent Taxpayers

Dated: February 22, 1984